3d at 371 (the plaintiff's complaint referred to the disclosure as "information concerning their adversaries"). Therefore, *NIFLA* and the four cases adopting Relatedness reasoning appear to provide that disclosures are uncontroversial when they are not *directly relevant* to the speaker's product or service—which, of course, includes when the disclosure "in no way relates" to it. *See, e.g.*, *id.* Three more cases offer support for this reasoning but draw the line differently. *See CTIA*, 928 F.3d at 845 (noting disclosure was not "fundamentally at odds" with speaker's mission in finding disclosure uncontroversial); *Wheat Growers*, 468 F. Supp. 3d at 1259 (same); *Maryland Shall Issue*, 2023 U.S. Dist. LEXIS 48566, at *41 (finding the information in the disclosure was "not antithetical to gun retailers' mission of selling firearms" and was, therefore, uncontroversial).

IV. The "Factually Debated" Line of Reasoning: Four Cases Have Found a Disclosure Controversial When Experts in the Field Would Disagree About Whether it is True.

[This section has been omitted for brevity.]

V. The "Controversial-to-Society" Line of Reasoning: Two Courts Have Held, and Four Courts Have Expressly Rejected, That Disclosures May Be Controversial Simply Because They Concern a Politically Controversial Topic.

Nearly all lower courts have declined to embrace, or have expressly rejected, Justice Thomas's suggestion in *NIFLA* that a disclosure is controversial if it concerns a politically controversial topic. *See NIFLA*, 138 S. Ct. at 2372 (noting that abortion is "anything but controversial"). Some circuit courts have offered dicta that, when taken out of context, appear to support Thomas's interpretation of the rule. *See Recht*, 32 F.4th at 416 ("[T]he Supreme Court

cautioned against applying *Zauderer* to disclosures that . . . compel speech on hotly contested topics." (citing *id.*)); *CTIA*, 928 F.3d at 847 (noting that disclosure was not "inflammatory" in finding it uncontroversial). These same cases, however, explicitly reject Justice Thomas's reading of uncontroversial. *See infra* pp. 16.

Only two cases since *NIFLA* have adopted Justice Thomas's apparent reasoning that a disclosure demands a higher level of scrutiny when it concerns a topic that is controversial in public discourse: *Bongo* and *Maryland Shall Issue*. *See NIFLA*, 138 S. Ct. at 2372; *Bongo*, 603 F. Supp. 3d 584; *Maryland Shall Issue*, 2023 U.S. Dist. LEXIS 48566. Under this "Controversial-to-Society" reasoning, "whether any particular mandated message is controversial must be ascertained by considering that message in the context of the society and setting in which the message is being required." *See Bongo*, 603 F. Supp. 3d at 592. The disclosure need not force the speaker to "expressly endorse or decry" a controversial topic in order to be considered controversial—the disclosure must only pertain to the controversial topic. *See id.* at 608; *see also Am. Bev Ass'n*, 916 F.3d at 761 (Ikuta, J. dissenting) ("The record shows this is a *controversial topic*, and therefore, the ordinance does not qualify as 'uncontroversial information' under . . . *NIFLA*.") (emphasis added).

One of the two cases following the Controversial-to-Society approach, *Bongo*, discussed *supra* at pp. 5-6, focuses much of the opinion on the political controversy surrounding bathroom use by transgender people. *See Bongo*, 603 F. Supp. 3d at 592 ("[T]here are people who would welcome the signs and people who would find them repellent. That is the very definition of a controversy."); *see also Maryland Shall Issue*, 2023 U.S. Dist. LEXIS 48566 at *40 (holding that requiring gun retailers to distribute pamphlets on suicide prevention and violent conflict resolution was an uncontroversial disclosure where pamphlets concerned

uncontroversial issues of suicide and conflict resolution, rather than the controversial issue of gun ownership). *Bongo* thoroughly analyzes the multiple levels on which the bathroom signage is politically controversial, beginning by noting that sexual orientation and gender identity are "controversial subjects" themselves. 603 F. Supp. 3d at 590 ("[T]he question of whether humans should be organized into two binary and all-inclusive 'biological sexes' involves contested ideological premises . . . ."). The court proceeded with a detailed discussion of the controversy surrounding transgender people's use of public bathrooms. *See id.* at 608. The court also analyzed the political controversy in the statute's legislative history, demonstrating that the legislature was motivated by a fear of transgender people and a desire to retaliate against building managers who chose to include gender-neutral bathrooms in their facilities. *Id.* at 593 (highlighting an assemblymembers public concern about "hypothetical sexual predators . . . [taking] advantage" of trans-inclusive public restrooms). Notably, the *Bongo* court used Justice Thomas's reasoning from *NIFLA* to strike down a statute Justice Thomas himself might have supported. *Id.*; *see also Maryland Shall Issue*, 2023 U.S. Dist. LEXIS 48566 at *41 (using Controversial-to-Society reasoning to uphold a statute unfriendly to gun retailers).

The Ninth Circuit explicitly rejected the Controversial-to-Society rule in *CTIA*. 928 F.3d at 845. "We do not read the Court as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial." *Id.* The Fourth Circuit took a similar view in *Recht*, reasoning that the "question is not whether the *existence* of a given disclosure requirement is controversial . . . , [but rather] whether the *content* of a required disclosure is controversial." 32 F.4th at 418 (emphasis added); *see also Ill. Fuel & Retail Ass'n v. Dep't of Revenue*, No. 22-3089, 2022 U.S. Dist. LEXIS 111343, at *8-9 (C.D. Ill. 2022) ("[I]ncumbent [political] officials' [public] statements about the mandatory signage do not

change the *substance* of the signage such that the factual information within the signage is converted to political speech.”). Given that nearly all courts have declined to follow this reasoning, and that two circuit courts have explicitly rejected it, the message appears clear (so far) that courts do not wish to accept Justice Thomas’s invitation to a more politically charged future of compelled commercial speech analysis.

CONCLUSION

With only two exceptions, lower courts have declined to limit their analysis of uncontroversial to whether a disclosure concerns a politically controversial topic, with the Ninth and Fourth Circuits explicitly rejecting this reasoning. Rather, courts have adopted one or more of three prevalent lines of reasoning in reaching a holding consistent with the Dissuasion Framework: Disclosures are controversial where they dissuade all uses of the speaker’s product or service, and they are uncontroversial where they dissuade only some or no uses.

Applicant Details

First Name	**Halie**
Last Name	**Mariano**
Citizenship Status	**U. S. Citizen**
Email Address	**hmariano@unc.edu**
Address	**Address** Street **623 Coolidge St** City **Chapel Hill** State/Territory **North Carolina** Zip **27516** Country **United States**
Contact Phone Number	**5856987419**

Applicant Education

BA/BS From	**Bucknell University**
Date of BA/BS	**May 2020**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 10, 2024**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**North Carolina Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Holderness Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Muller, Eric
emuller@email.unc.edu
919.962.7067
Gurvich, Rachel
gurvich@email.unc.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

HALIE MARIANO
623 Coolidge Street, Chapel Hill, NC 27516 | (585) 698-7419 | hmariano@unc.edu

June 9, 2023

The Honorable Juan R. Sánchez
United States District Court, Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Chief Judge Sánchez:

I am a rising third-year law student at the University of North Carolina School of Law, where I serve as the Executive Comments Editor of the *North Carolina Law Review*, compete on UNC's alternative dispute resolution moot court teams, and facilitate pro bono projects as a member of the UNC Pro Bono Board. After receiving my undergraduate degree from Bucknell University, I am excited at the prospect of returning to Pennsylvania, specifically Philadelphia, where many of my close friends and community reside. Additionally, the opportunity to work for a judge of color who values diversity in chambers would be an invaluable experience.

While in law school I have honed my research and writing skills. I have written academic pieces for the *North Carolina Law Review* and for my classes, edited pieces for the *Law Review*, and gained practical experience as a summer associate at both Williams & Connolly LLP and McGuireWoods LLP. These experiences confirmed my desire to litigate at the trial level and stirred a passion for diving into new and unfamiliar areas of the law. I am excited to bring these skills to a clerkship position.

As a Korean American adoptee, I hope to bring a unique perspective to chambers. Growing up, I realized that my life could have been radically different if my parents did not adopt me as an infant. Knowing that so many children do not have this opportunity motivates me to take advantage of every experience I can to grow and develop. My unique family composition and multicultural heritage has also encouraged me to give back to others. I have done this during law school by serving as a Guardian ad Litem, where I utilize the lessons and experiences from my childhood to advocate for foster children throughout the legal system.

The combination of my personal background, my time as a four-year Division I student-athlete, and my experiences within large law firms has helped refine my organizational and time management skills. I have also learned to lead and be a team player in various academic, athletic, and professional settings. These skills make me well-suited not only to individual, self-driven work, but also to collaboration with others.

Included in my application is my resume, writing sample, unofficial law school transcript, and letters of recommendation. Thank you for your time and consideration.

Sincerely,

Halie Mariano

HALIE MARIANO

623 Coolidge Street, Chapel Hill, NC 27516 | (585) 698-7419 | hmariano@unc.edu

EDUCATION

University of North Carolina School of Law, *Chapel Hill, North Carolina*
J.D., expected May 2024 G.P.A.: 3.675 (top 20% of class)

- Executive Comments Editor, *North Carolina Law Review*, Vol. 102
- Holderness Moot Court, Sports Law Negotiations Team
- Honors Writing Scholar for 1L Legal Research & Writing Program
- Eugene Gressman & Daniel H. Pollitt Oral Advocacy Award (2022)
- UNC Pro Bono Board (2021–23) & 150+ pro bono hours

Bucknell University, *Lewisburg, Pennsylvania*
B.S.B.A., *magna cum laude*, Management & Anthropology, May 2020 G.P.A.: 3.820

- Phi Beta Kappa
- Division I Varsity Softball (captain)

EXPERIENCE

Williams & Connolly LLP, Washington, DC May 2023 – Present
Summer Associate
Researched legal issues and drafted memoranda to advise partners and clients in complex civil litigation and appellate matters. Wrote multiple motions in limine to exclude prejudicial evidence in a criminal lawsuit. Worked with attorneys to develop case strategy and provided litigation counseling for Afghan asylum seekers.

McGuireWoods LLP, Charlotte, NC May 2022 – July 2022
Summer Associate
Conducted legal research, reviewed briefs, and wrote analytical memoranda for several general litigation matters. Analyzed agreements for transactional and corporate matters. Participated in in-house client rotation with Barings LLC.

Institute for Women's Policy Research, Washington, DC September 2020 – June 2021
Mariam K. Chamberlain Research Fellow
Conducted research projects on inequality, impact of COVID-19, violence against women, and diversity in STEM. Authored reports and blogs, developed literature reviews, and fact-checked publications.

National Collegiate Athletic Association (NCAA), Indianapolis, Indiana May 2019 – June 2021
Division I Student-Athlete Advisory Committee & Committee on Women's Athletics Member
Represented the Patriot League's 5,200 student-athletes. Provided feedback on NCAA legislation; recommended and passed National Election Day Off legislation; and advised the NCAA on gender- and inclusion- related issues.

Bucknell-Geisinger Research Initiative, Lewisburg, Pennsylvania May 2019 – September 2020
Senior Research Assistant
Studied barriers to social mobility and health by linking qualitative interviews with electronic health records. Planned and executed over 35 in-depth interviews. Generated narrative analyses of interviews and coded qualitative data.

PUBLICATIONS

The Status of Women in North Carolina: Poverty and Opportunity, Institute for Women's Policy Research. (Elyse Shaw and Halie Mariano – 2022)
Tackling the Gender and Racial Patenting Gap to Drive Innovation: Lessons from Women's Experiences, Institute for Women's Policy Research. (Elyse Shaw and Halie Mariano – 2021)
Narrow the Gender Pay Gap, Reduce Poverty for Families: The Economic Impact of Equal Pay by State, Institute for Women's Policy Research. (Elyse Shaw and Halie Mariano – 2021)

INTERESTS

Born in South Korea. Lived in New Zealand for five years. Enjoys cooking, running, and the New York Yankees.

UNC SCHOOL OF LAW

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Unofficial Transcript

Note to Employers from the Career Development Office: Grades at the UNC School of Law are awarded in the form of letters (A, A-, B+, B-, C, etc.). Each letter grade is associated with a number (A = 4.0, A- = 3.7, B+ = 3.3, B = 3.0, etc.) for purposes of calculating a cumulative GPA. An A+ may be awarded in exceptional situations. For more information on the grading system, including the current class rank cutoffs, please contact the Career Development Office at (919) 962-8102 or visit our website at https://law.unc.edu/careers/for-employers/grading-policy-faq/

Halie Mariano
GPA: 3.675

Class	Description	Units	Term	Grade
LAW 199-01	Transition to the Profession I	0.50	Fall 2021	**PS**
LAW 201	Civil Procedure	4.00	Fall 2021	**A**
LAW 205	Criminal Law	4.00	Fall 2021	**A**
LAW 209	Torts	4.00	Fall 2021	**A**
LAW 295	Research, Reasoning, Writing & Advocacy I	3.00	Fall 2021	**B+**
LAW 199-02	Transition to the Profession II	0.50	Spring 2022	**PS**
LAW 204	Contracts	4.00	Spring 2022	**A-**
LAW 207	Property	4.00	Spring 2022	**A**
LAW 234A	Constitutional Law	4.00	Spring 2022	**A-**
LAW 296	Research, Reasoning, Writing & Advocacy II	3.00	Spring 2022	**A**
LAW 220	Administrative Law	3.00	Fall 2022	**B+**
LAW 242T	Evidence	3.00	Fall 2022	**B+**
LAW 467	Negotiation	3.00	Fall 2022	**B+**
LAW 528	Race, Law & National Security	3.00	Fall 2022	**A**
LAW 206	Criminal Procedure Investigations	3.00	Spring 2023	**B+**
LAW 266	Professional Responsibility	2.00	Spring 2023	**B+**
LAW 275	Secured Transactions	3.00	Spring 2023	**A-**
LAW 301	Legislative Advocacy	2.00	Spring 2023	**A-**
LAW 550	Race & the Law	3.00	Spring 2023	**B+**
LAW 564	Dispute Resolution Competition Lab	1.00	Spring 2023	**PS**

**Federal Jurisdictions to be taken Fall 2023

= GPA	**3.675**

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my great pleasure to offer you this recommendation of Halie Mariano for a clerkship in your chambers. It's an unqualified, enthusiastic recommendation. Halie is a rising star!

A word about me, so you'll know where this is coming from: I've been teaching since 1994, first at the University of Wyoming College of Law, and, since 1998, at UNC School of Law. Before going into academia, I was a federal district court law clerk (District of New Jersey) and an Assistant US Attorney (same district).

I began to get to know Halie a bit less than a year ago, when she was in my Constitutional Law class as a first-year student. It was a large-ish class – around 60 students – but Halie quickly stood out as one of the very best in the class. This was confirmed, of course, in her excellent performance on the final exam, where she earned an A- (and was just a point short of an A). But her strong performance came as no surprise; Halie was a reliable—and, more importantly, smart—contributor to our class discussions. These are difficult days for the study of Constitutional Law in law schools. Sensibilities are raw, politics are at the surface, and respect for the Supreme Court is the lowest I've seen in my three decades in this business. Halie came at the course with fresh, wide-open eyes, and an inquiring rather than pontificating approach. Unlike most students, who have a hard time seeing beyond the specific opinion assigned for that day's class, Halie constantly evaluated what she was reading against all of the cases she'd read until that point, and worked hard to find points not just of discontinuity but also of continuity between the Justices' various approaches. She certainly came to the material with the viewpoint of a liberal, but unlike most of her fellow students, she allowed the material to challenge her to rethink her premises. She resisted the urge to just say, "oh, this is all just politics," as so many do these days, and instead tried to understand constitutional law as a body of actual law, however racked by internal tensions it might be. I think the word I'd use for Halie's approach is **mature**.

During the fall semester, Halie was one of 15 students in a small legal history seminar I've just started offering. The topic of the seminar is the legal history of the removal and imprisonment of Japanese Americans in World War II. Here again, Halie was an all-star. In her seriousness of engagement with the material she was one of the top two students. She wrote six short "reaction papers" to the assigned reading across the semester and all were excellent—well-written, well-organized, and insightful. Her final paper was outstanding. She chose a knotty topic for herself, gauging the legal validity of the Court's claim in the recent "travel ban" case, *Trump v. Hawaii*, that it was overruling the notorious-but-never-formally-overruled case of *Korematsu v. United States*. (It's not self-evident that the majority opinion should be believed on this point, as the overruling came in obvious *dicta* and the majority opinion arguably makes some of the same mistakes as the Court made in *Korematsu*.) Halie's analysis was astute, and again, as with her other papers, her writing was excellent and well-structured.

In candor, I have to say that even though Halie's academic performance has been excellent, her smarts have not been the thing that has most distinguished her in my mind. It's her character. Halie was born in South Korea and adopted as a baby by a white American family. From the first time we met in January of 2022, she was very open about both the miracle and the challenges of her adoption and its legacy. She is immensely appreciative of her parents for bringing her into their lives and raising her lovingly and with abundant opportunities all around her. Yet she has also had to negotiate the complexities of being an Asian American growing up in a white family and a mostly white community. These experiences have made her an astute cultural observer. They have also motivated her to achieve – to take advantage of the many opportunities that she knows she would not have had growing up in her birth family. Her athletic prowess as an undergrad at Bucknell is indicative of her will to compete and excel at what she does. She wants to be, as she puts it, "the best, and if not the best, then the very best she can be." Halie is, quite simply, going places. She has the makings of a star lawyer of her generation.

I mention Halie's athletic background because I think it reveals something about how she will be in a workplace. She understands intuitively that success is a team, not an individual, venture. She shines in small-group work, where she both speaks her mind and ensures a good group dynamic. I have absolute confidence that Halie will be a delight in your chambers, shouldering her own workload while also contributing to a positive, friendly, caring office dynamic.

I simply cannot wait to see where Halie Mariano ends up, and I very much hope her career might start with a clerkship in your chambers. She's a gem.

I'll be happy to field a call if you'd like to talk further. My cellphone number is 919-931-5950.

Best regards,

Eric Muller
Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics

Eric Muller - emuller@email.unc.edu - 919.962.7067

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am delighted to recommend Halie Mariano for a clerkship in your chambers. Halie is a well-rounded student and an excellent legal researcher and writer. She is also a true leader who has earned the respect of the entire Carolina Law community, including faculty, staff, and students of all class years. Halie's work ethic is exemplary, and her maturity, ability to connect with peers and supervisors, and positive attitude, even in the most challenging times, make her a pleasure to work with. She will be an outstanding law clerk.

I have known Halie since I taught her in Research, Reasoning, Writing, and Advocacy (RRWA) during her first semester of law school. Taught in small sections, RRWA provides foundational, practice-oriented instruction which helps students develop the skills necessary to communicate professionally as attorneys. Working both individually and in teams, students learn the fundamentals of legal research, reasoning, and writing, primarily by simulating important aspects of law-office work.

I'm lucky to have worked closely and collaboratively with Halie when she was my student. That semester, I read multiple drafts of many pieces of her writing and met with her for six required individual conferences. But even outside those conferences, Halie's dedication to improving her written legal analysis led her to seek additional constructive feedback on her work. She regularly attended office hours and "bonus" conferences, even meeting with me multiple times after the end of RRWA I to continue developing her skills. Since her 1L year, Halie has remained in close contact with me and we've met to discuss course selection and extracurricular activities, employment opportunities, and clerkships.

Halie was already an impressive legal researcher in her 1L year, but her substantial research experience since then—as a summer associate at top-notch law firms, an author and editor on Law Review, and in courses with rigorous writing components—has honed and broadened her skills. As a former law clerk myself, I would not hesitate to seek Halie out for particularly complex or thorny legal issues, trusting that her research would both cover the field of potentially relevant solutions, casting as wide a net as appropriate, and also dive deep where relevant.

Halie's legal writing is top-notch. Her legal analyses are well organized, cogent, and thorough. She is especially good at extracting sophisticated rules from legal authorities and making good judgments about which cases to focus on for meaningful analogies and distinctions. Halie's application of law to fact is thorough, deliberate, and persuasive. She structures each piece of written work product with care, making sure that she sets up a helpful legal framework, meets her audience's expectations, and guides her reader with clear, easy-to-follow prose. And the variety of writing experiences that Halie has had since the fall of her 1L year—both academic and practical—have given her the opportunity to gain confidence and efficiency when writing complex, long-form documents.

Halie is a leader with an impeccable work ethic. Whether as the captain of a Division I softball team, a conference delegate to the NCAA National Student-Athlete Advisory Committee, or the sole Division I athlete on the NCAA's Committee on Women's Athletics, Halie's peers consistently recognize her vision and capacity to lead. Within weeks of arriving at the law school, Halie was selected from among a large group of applicants to be the 1L Class Representative on the Pro Bono Board, one of Carolina's most active and respected student organizations. And in my class, when students worked in small groups—which was often—Halie's leadership and careful preparation consistently kept her group engaged and on task.

Halie's oral communication skills are unparalleled among her peers. I didn't have the pleasure of teaching Halie during her spring legal writing class, when our curriculum shifts from objective writing to written and oral advocacy. But according to the professor who did teach her, Halie delivered the single best appellate oral argument he heard that spring across both of his sections of RRWA II. (I vividly remember him stopping me in the hall just to tell me how great Halie was.) As a result, he selected her to receive a Gressman-Pollitt award for exceptional oral advocacy.

Halie's oral communication is just as effective in less formal settings. She thinks on her feet and expresses her positions not only with confidence and clarity, but also with openness and humility. She asks for clarification when necessary and, when she disagrees with someone, appropriately and gently pushes back in ways that ultimately enrich the discussion. Halie was a consistent and enthusiastic participant in my class, and her engagement with the material always served her classmates well. Importantly, she is also an active and compassionate listener, making any conversation with her a pleasure. These skills are apparent after a single conversation with Halie: during both of her job-search cycles, employers were bending over backwards to recruit her after their interviews, leaving her with the enviable problem of having to choose among many competing offers.

Interpersonally, Halie is kind, warm, and easy to talk to. She is fundamentally devoted to diversity and public service, and cares fiercely about her community. These values inform Halie's extracurricular involvement in college and law school, her vision for her career as an attorney, and the way she moves through the world. She is attentive, collaborative, and easygoing. She would be a perfect fit for a close-knit work environment.

Rachel Gurvich - gurvich@email.unc.edu

In short, I believe that Halie would be an invaluable addition to your chambers. I would be happy to answer any questions you may have about Halie. Please feel free to contact me directly at (617) 640-9764 or gurvich@email.unc.edu.

Best regards,

Rachel Gurvich

HALIE MARIANO
623 Coolidge Street, Chapel Hill, NC 27516 | (585) 698-7419 | hmariano@unc.edu

Writing Sample

This writing sample is an appellate brief I submitted in my 1L legal research and writing course. I wrote and revised this brief independently and received limited professor feedback. The brief is based on a closed universe of cases, some of which had been edited for this assignment.

CASE NO. 2:21-cr-02493

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TRAVIS ANTHONY HOPKINS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE, AT GREENVILLE

BRIEF FOR THE APPELLANT

Halie Mariano
Attorney for the Appellant
160 Ridge Road
Chapel Hill, North Carolina 27514
(585) 698-7419
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STATEMENT OF THE ISSUE

Whether the district court erred in applying the Armed Career Criminal Act's ("ACCA") sentence enhancement, 18 U.S.C. § 924(e)(1), to Travis Anthony Hopkins after finding that the crimes he committed within a single hour the night of April 2, 2009, were three separate occasions.

STATEMENT OF THE CASE

In May 2021, Travis Anthony Hopkins pled guilty to one count of possession of a firearm by a felon under 18 U.S.C. § 922(g)(1). R. 2. He received an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). At sentencing, the district court found that Hopkins' three felony convictions, each resulting from crimes he committed the night of April 2, 2009, were three separate occasions sufficient to trigger the ACCA enhancement. This timely appeal followed.

On April 2, Hopkins climbed a fence to enter the Belmont Estates Apartments. R. 23. Earlier in the day he watched four friends, seemingly roommates, come out of an apartment with luggage and camping supplies. R. 28-29. Before leaving, one of the roommates yelled up to the others to make sure the door was locked and that there was enough food for the cat for three days. R. 28. Hopkins watched the roommates drive away in a Porsche Cayenne, with the impression that the students might have money or food for taking. Hopkins had struggled to maintain a consistent income since losing his job in 2007. R. 29.

Shortly after midnight, Hopkins jumped the fence into the apartment complex and used a crowbar to access Apartment 224—the same apartment he watched the four roommates depart from earlier that day. R. 23. Feeling stressed about the prospect of his family's future given his financial instability, over the next twenty-five minutes, Hopkins entered two of the bedrooms attached to the living room and kitchen common area, and in between spent time lounging in the apartment and eating food from the fridge. During this time, Hopkins removed a small handheld

personal computer, keys, and a wallet (with sixty dollars inside) from one bedroom, and some jewelry from the other. R. 25.

What was unclear to Hopkins that night was the "unique business model" Belmont Estates used. At Belmont Estates, four or five "apartments" share a common area with a kitchen and living room. R. 24. Doors off the common area lead to separate bedrooms and bathrooms for each of the roommates—each of which has their own locks with keys. R. 24. Hopkins did not know apartments like these existed and assumed the four roommates shared one individual apartment with separate bedrooms. R. 29. He recalls thinking, "when I went in there, I was just thinking I was in a regular apartment." R. 29. Even the trial judge noted that "it sounds like he broke into Apartment 224 and then robbed two . . . rooms in the apartment. Like he robbed two roommates." R. 30.

With Belmont Estates' business model, each resident has a separate lease, and plaques within Apartment 224 identified the different "apartments" within the larger residence. R. 24. When Hopkins entered the individual rooms, it was dark and he could not see the plaques, which were small and located above the frame of each bedroom door. R. 25. While Hopkins noticed it was odd that the separate rooms in the apartment had different locks and keys, the layout of the apartment closely resembled an average four-bedroom apartment. R. 30.

After moseying around the apartment, Hopkins saw a flashlight outside the main apartment door and panicked. R. 30. He jumped through an apartment window as one police officer forced through the apartment door. R. 30-31. Upon landing safely out of the two-story window, another police officer, Officer Thomas, ordered Hopkins to freeze. R. 31. Fearing the consequences, Hopkins turned and ran toward the other side of the apartment complex. R. 32. Officer Thomas pursued on foot. R. 32.

Hopkins took respite in a culvert while the officers continued searching for him. R. 32. In their search, Officer Thomas walked down the hill near the culvert, and Hopkins popped out, stunning Thomas with a crowbar before running away. R. 32-33. Hopkins recalled feeling "trapped" and panicked" with his heart "going about five miles a minute," never intending to hurt anyone. R. 33. As a result of these events, Hopkins pled guilty to two counts of aggravated burglary and one count of aggravated assault, and then served forty-two months in prison. R. 11.

In early 2021, Hopkins was leading a normal and problem-free life until he was detained by the Federal Burau of Investigations in an investigation related to Walker Lanergan. Hopkins was under suspicion for soliciting Langeran to assault one of Hopkins' co-workers. R. 11. During this detention, FBI agents discovered that Hopkins possessed a firearm purchased in 2012. R. 11. While the United States indicted Hopkins on solicitation charges, Hopkins vigorously maintains his innocence with respect to that crime, and the United States Attorney's office dropped that count of the indictment when Hopkins accepted the plea agreement. R. 12.

Since Hopkins' release from prison in 2012, he has held steady employment and leads a stable life, making approximately $30,000 per year and living alone in his Nashville apartment. R. 14. Additionally, while Hopkins' ex-wife has primary custody over their two daughters, Hopkins sees his children regularly, at least twice per month, and for extended periods each summer. R. 14. Hopkins also maintains a healthy relationship with his ex-wife, who is happy to give him time with their daughters. R. 14. Hopkins has no history of substance use issues and drinks socially but does not use drugs. R. 15. His mental and emotional health remains stable, apart from the regular stress associated with his legal challenges. R. 14-15.

SUMMARY OF THE ARGUMENT

Hopkins' criminal acts on the night of April 2, 2009, do not constitute three separate occasions as required by the Armed Career Criminal Act ("ACCA") to apply the fifteen-year mandatory sentence enhancement. An "occasion" is defined by "separate and distinct transactions" that show "a completion or definable endpoint" between crimes—neither of which is present in Hopkins' case.

Congress intended for the ACCA's sentence enhancement to target and punish recidivism, where three-time offenders could no longer get away with recurring felonies. But the Act's application has been extended to categorize continuous criminal episodes as separate occasions, resulting in an over-application of the sentence enhancement.

In this case, Hopkins' offenses on April 2, should not be considered three distinct occasions for several reasons. First, the two burglaries within Apartment 224 should be considered a single criminal episode. The offenses occurred simultaneously and continuously, making them essentially indistinguishable from one another, despite Belmont Estates' unique business model. Second, the subsequent assault of Officer Thomas is analogous to a former Sixth Circuit case, *United States v. Graves*, which illustrates that events occurring at the same location, within moments of one another, should be considered a single, continuous criminal episode.

The facts of Hopkins' crimes on April 2, 2009, do not demand the application of the ACCA's sentence enhancement, which is meant to dissuade career criminals from persistent reoffending. Rather, Hopkins' actions that night constitute only one or two separate occasions, and thus, do not meet the requirements of the sentence enhancement provision.

ARGUMENT

This court reviews questions of law *de novo*, while factual determinations are reviewed for clear error. *United States v. Graves*, 60 F.3d 1183, 1185 (6th Cir. 2006). Whether prior criminal conduct was a single occasion or multiple separate occasions under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), is a legal question of statutory interpretation, so the District Court's decision will be reviewed *de novo*. *United States v. Murphy*, 107 F. 3d 1199, 1208 (6th Cir. 1997).

The District Court erred in applying the Armed Career Criminal Act's sentence enhancement, as Hopkins' three crimes on April 2, 2009, did not occur on three separate "occasions."

In cases where an individual with three previous convictions for violent felonies or serious drug offenses, committed on occasions different from one another, possesses a firearm, the ACCA provides a mandatory fifteen-year minimum prison sentence. 18 U.S.C. § 924(e)(1). Whether prior offenses may be treated as predicate crimes occurring on separate occasions under the ACCA does not depend on the number of convictions or the number of victims. *United States v. Thomas*, 211 F.3d 316, 319 (6th Cir. 2000). Rather, the absence of "a completion or definable endpoint" of the first crime before the second began supports a claim for the sentence enhancement's inapplicability. *Id*. at 321.

Defined broadly, an "occasion" is distinct from a criminal "episode." *See Thomas,* 211 F.3d at 319; *United States v. Brady*, 988 F.2d 664, 668 (6th Cir. 1993). An episode is an "incident that is part of a series" but forms a "separate unit" within the whole. *Brady*, 988 F.2d at 668. Although related to the entire course of events, an episode is a "punctuated occurrence" with a "limited duration," making an episode only a part of a larger criminal "occasion." *Thomas,* 211

F.3d at 319. While proximity alone does not make two crimes a single episode, crimes that "occur simultaneously" count as only *one* predicate offense. *Brady*, 988 F.2d at 668.

This Court uses three indicia to show whether offenses are separate occasions from one another: (1) Whether it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins; (2) whether it would have been possible for the offender to cease his criminal conduct after the first offense; and (3) whether the offenses were committed in different residences or business locations. *United States v. Hill*, 440 F.3d 292, 297 (6th Cir. 2006). However, these indicia have been applied inconsistently, and do not align with the legislative intent behind the ACCA's sentence enhancement provision. *See Brady*, 988 F.2d at 668; *Thomas*, 211 F.3d at 319. Thus, the analysis of Mr. Hopkins' crimes should not be judged solely on these flawed indicia.

Congress intended for the ACCA to punish recidivism and career criminals who committed three separate felonies on different occasions. *United States v. Graves*, 60 F.3d 1183, 1187 (6th Cir. 1995). Because Congress intended to punish recidivists, the predicate conduct must amount to "separate and distinct" transactions in some "definable" sense. *United States v. Murphy*, 107 F.3d 1199, 1210 (6th Cir. 1997). To consider criminal conduct as a "definable" event, there must be a reasoned basis for doing so. *Id*.

The ACCA's sentence enhancement aims to convict "three-time losers"— career criminals consistently engaging in dangerous and violent crime. *Brady*, 988 F.2d at 666. This court emphasizes that deciding to apply this statute should not be a "reach," but instead, the statute should be applied when "the facts *demand* its application." *Graves*, 60 F.3d at 1187 (emphasis added). If the facts warrant the application of the ACCA, this court places the burden on the government to show that the defendant had "three previous convictions . . . for a violent felony or

a serious drug offense . . . committed on occasions different from one another." *United States v. Barbour*, 750 F.3d 535, 537; 18 U.S.C. § 924(e)(1).

A. The burglaries were not separate occasions as defined by the ACCA.

One sign of a distinct criminal occasion is if the defendant asserted substantial "dominion and control" over both victims at the same time. *Thomas,* 211 F.3d at 321. In *United States v. Thomas*, defendant Thomas' two convictions for sexual assault did not constitute two separate offenses under the ACCA. *Id.* at 317. When two women asked Thomas and his friend for directions, the men agreed to show them the way in exchange for a ride. *Id*. at 318. Thomas and his friend entered the back seat of the car and proceeded to sexually assault the women. *Id.* at 319. Because the acts could not have been committed on occasions different from one another, and arose out of a single, continuous criminal episode, the ACCA's sentence enhancement was inapplicable. *Id.*

Here, as in *Thomas*, there was not a "completion or definable endpoint" between the burglaries. Hopkins entered the apartment thinking it was a singular apartment with four bedrooms, not the unique business model Belmont Estates had implemented. Hopkins entered two of the bedrooms attached to the living room and kitchen and removed a series of inexpensive items thinking he was in a singular apartment. Additionally, given the darkness of the apartment, Hopkins could not see the individual plaques above each bedroom door. Rather, the burglaries occurred almost "simultaneously" as Hopkins navigated through the apartment and, similar to *Thomas*, should be deemed a "single, continuous episode."

Even the trial judge noted that Hopkins seemed to have "robbed two roommates," not two separate apartments. Hopkins had previously watched the four roommates engage as friends and leave on a road trip together, leaving no reason to think there was more than one "apartment"

inside the larger apartment. As in *Thomas*, the acts could not have been committed on occasions different from one another based on the proximity and timeline of the offenses. The inability to decipher between the end of one burglary and the other represents the impossibility of defining these acts as two "separate and distinct" transactions where Hopkins had "dominion and control" over the burglary victims. The acts occurred at the same location "within moments," likely constituting a criminal "episode," but not a separate occasion. As a result, the facts do not "*demand* [the ACCA's] application." Applying the sentence enhancement only undermines the original intent of the ACCA—to punish recidivism.

B. The assault was not a separate occasion as defined by the ACCA.

When applying the ACCA sentence enhancement, a court cannot count two predicate felony convictions related to only a single criminal act as separate occasions. *United States v. Taylor*, 882 F.2d 1018, 1029 (6th Cir. 1989). This reasoning applies to cases in which two crimes occurred at one location. *See Graves*, 60 F.3d at 1186-1187. In *Graves*, the defendant's burglary of a home and the subsequent assault on a police officer in the woods outside the home were deemed a single episode of criminal conduct. *Id*. The defendant, Graves, had not left the location of the burglary when he was confronted by the officers. *Id.* at 1187. This court reasoned that since the assault on the police officer occurred at the "same location within moments" of the burglary, the assault was part of a singular criminal episode. *Id.* at 1186-1187.

Here, Hopkins' assault on Officer Taylor was a continuation of the previous burglaries. As in *Graves*, when the officers approached Hopkins, he had not left the location of the burglary and was still on Belmont Estates property. While Graves assaulted the officer in the woods outside the home of the burglary, Hopkins assaulted Officer Thomas from a culvert only a short walk from Apartment 224. Since the assault occurred at the "same location within moments" after the

burglaries, the assault should not be considered a separate occasion under the ACCA, but a "single, continuous criminal episode."

Deeming the assault a separate occasion contradicts the legislative intent behind the ACCA's sentence enhancement. Hopkins should not be cona "three-time loser" based on the simultaneous burglaries and the subsequent assault. Instead, the series of three convictions should be measured based on the single location and limited duration of the crimes, neither of which was "separate and distinct" from one another. Because of this, Hopkins is not a dangerous career criminal, and the facts, once again, do not demand the ACCA's application. Intended to punish recidivism, the ACCA's sentence enhancement should not apply to Hopkins, whose previous convictions occurred on one day, within a limited time, and at a singular location.

CONCLUSION

In holding that Hopkins' 2009 convictions constitute three separate offenses, the district court erred in applying the Armed Career Criminal Act's (ACCA) sentence enhancement. For the foregoing reasons, the appellant further argues that the court's sentencing decision should be reversed due to the court's erroneous classification of Hopkins as a violent career criminal. The case should be remanded for resentencing without the application of the ACCA's sentence enhancement.

Respectfully submitted,

S/ Halie Mariano
Halie Mariano
Attorney for the Appellant
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Chapel Hill, North Carolina
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Applicant Details

First Name	**Will**
Last Name	**Martel**
Citizenship Status	**U. S. Citizen**
Email Address	**willmartel@uchastings.edu**
Address	**Address** Street **825 SHRADER ST** City **SAN FRANCISCO** State/Territory **California** Zip **94117** Country **United States**
Contact Phone Number	**4155094114**

Applicant Education

BA/BS From	**Occidental College**
Date of BA/BS	**May 2019**
JD/LLB From	**University of California, Hastings College of the Law** **http://uchastings.edu**
Date of JD/LLB	**May 18, 2024**
Class Rank	**5%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Wagner National Employment and Labor Law Competition** **National Health Law Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hand, Keith
handk@uchastings.edu
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(415) 565
González, Thalia
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Aumiller-Twigg, Alex
alex.aumiller-twigg@sonoma-county.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

WILL MARTEL

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June 12, 2023

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am writing to express my strong interest in a 2024–2025 clerkship with your chambers. My long-term goal is to be a public defender, and I can think of no better place to continue to refine my legal research and writing skills and commitment to public service than in your chambers.

I am a rising third year law student at the University of California College of the Law, San Francisco (formerly UC Hastings College of the Law). I am currently ranked first in my class at UC Law, SF, and I have received the CALI Award for the top grade in Criminal Law, Contracts Law, Criminal Procedure, Evidence Law, and Negotiation. I have completed a trial advocacy course and competed in three Moot Court competitions, winning a best brief award in one. I also have had the opportunity to collaborate closely with my professors: as a research assistant on a number of different legal projects, a teaching assistant for two Legal Research and Writing courses, and a Sack Fellow for Contracts Law. This has allowed me to deepen my knowledge in a variety of areas, hone my research and writing skills, and gain experience providing substantive instruction and feedback to first year law students.

But a clerkship with your chambers was not always part of my preferred career path. Initially, my desire to work in service of others pushed me to consider attending medical school. Working as an EMT after I graduated college, I deeply valued the opportunity to help others in their most difficult moments. Although I changed career paths, that desire still guides my aspiration to clerk in your chambers and ultimately be a public defender.

Throughout law school, I have continued to work in service of others. For example, as the treasurer of the Prisoner Outreach organization, I stepped beyond my traditional responsibilities to work as the director of the letter writing committee. Collaborating with a faculty mentor, the club president, and student volunteers, I organized responses to more letters in one semester than the previous two years combined.

Thank you for taking the time to consider my candidacy. Please feel free to reach out to my recommenders Professor Keith Hand (415-565-4803), Professor Thalia González (628-227-0919) and Alex Aumiller-Twigg (707-565-3881).

Sincerely,

Will Martel

WILL MARTEL

825 Shrader St. • San Francisco, CA 94117 • (415) 509-4114 • will.martel@gmail.com

EDUCATION

UC Law San Francisco (f/k/a UC Hastings), San Francisco, CA
J.D., *Social Justice Lawyering Concentration*, May 2024
GPA: 4.088 | Class Rank: 1/362
Honor Society; Milton D. Green Top Ten Citation; Thurston Society
UC Law SF Moot Court Team, 2022–2023 — Executive Board Member
Third Best Brief in Snodgrass Intramural Moot Court Competition
2022 National Health Law Competition
2023 Wagner National Employment and Labor Law Competition
Prisoner Outreach – *Treasurer*
Human Rights and International Law Organization – *Communications Director*
American Constitution Society – *Vice President of Academic Excellence*
CALI Awards: Criminal Law, Contracts Law, Criminal Procedure, Negotiation, Evidence
100 Pro Bono service hours (as of May 2023); 2023 Wiley W. Manuel Certificate for Pro Bono Legal Services

Occidental College, Los Angeles, CA
B.A., Double Major in Biochemistry and Philosophy (*Awarded Trustee Merit Scholarship*), May 2019
4-year Starting Pitcher on NCAA Baseball team

EXPERIENCE

Morrison Foerster, San Francisco, CA – *Litigation Summer Associate* May 2023 – Present

Professor Thalia González, UC Law SF – *Research Assistant* October 2022 – Present
- Research legal issues. Draft sections of law review articles, policy briefs, and presentations at the intersection of restorative, education, racial, health and economic justice.

UnCommon Law, Oakland, CA – *Student Parole Consultant* September 2021 – January 2023
- Reviewed parole hearing transcripts and case files for people serving life sentences.
- Drafted letters to clients recommending how to discuss criminal/social/disciplinary history, substance use, and more at their upcoming parole hearings.

Sonoma County Public Defender's Office, Santa Rosa, CA – *Summer Law Clerk* July 2022 – August 2022
- Researched and wrote memos and motions for legal issues in felony and misdemeanor cases.
- Conducted client intakes in court. Observed arraignments, settlement conferences, and disposition hearings.

California Appellate Project, San Francisco, CA – *Summer Legal Intern* May 2022 – August 2022
- Researched and screened the case of a client sentenced to death to identify issues for habeas appeal.
- Wrote and presented a memo outlining potential habeas issues.
- Participated in a week-long capital defense training.
- Visited San Quentin State Prison and met with client to discuss case and conditions.

Ogletree Deakins, San Francisco, CA – *Junior Paralegal* January 2020 – August 2021
- Constructed and organized exhibit binders for trial and discovery logs for ongoing litigation.
- Redacted and prepared documents for production and produced documents to opposing counsel.

American Medical Response, Santa Cruz, CA – *EMT* August 2019 – December 2019

VOLUNTEER

Prisoner Outreach, UC Law SF – *Director of Letter Writing Committee* August 2022 – Present

Legal Advice and Referral Clinic, San Francisco, CA – *Student Intake Volunteer* August 2022 – Present

2023 Detention Center Delegation, Nogales, AZ – *Student Volunteer* March 2023

UNIVERSITY OF CALIFORNIA
COLLEGE OF THE LAW, SAN FRANCISCO
200 McALLISTER ST, SAN FRANCISCO, CA 94102

STUDENT'S PERMANENT RECORD

Printed: 05 Jun 2023 Page: 1 of 1

NAME: William C Martel
ID No.: 0591514
Academic Program: JD

21/FA FALL 2021								
CIVIL PROCEDURE	105	12	A	R	4.0	4.0	16.00	
CRIMINAL LAW	115	12	A+	R	4.0	4.0	17.20	
PROPERTY	125	12	A	R	5.0	5.0	20.00	
LEGAL RESEARCH & WRITING I	131	27	A-	R	3.0	3.0	11.10	
					16.0	16.0	64.30	4.019 4.019
22/SP SPRING 2022								
CONTRACTS	110	22	A+	R	5.0	5.0	21.50	
TORTS	130	22	A	R	4.0	4.0	16.00	
LEGAL RESEARCH & WRITING 2	970	33	A	R	3.0	3.0	12.00	
CONSTITUTIONAL LAW I	120	21	A	R	3.0	3.0	12.00	
					15.0	15.0	61.50	4.100 4.058
22/FA FALL 2022								
RACE, RACISM & AMERICAN LAW	203	11	A	I	3.0	3.0	12.00	
CRIMINAL PROCEDURE	328	13	A+	I	4.0	4.0	17.20	
IMMIGRATION LAW	400	11	A	I	3.0	3.0	12.00	
APPELLATE ADVOCACY: CIVIL	821	12	A-	N	2.0	2.0	0.00	
SOCIAL JUSTCE CONCNTRN SEM 1	830	11	CR	N	1.0	1.0	0.00	
TEACHING ASSISTANT (LRW1)	980	60	CR	N	1.0	1.0	0.00	
MOOT COURT INTERCOLL COMPET	973	11	CR	N	2.0	2.0	0.00	
					16.0	16.0	41.20	4.120 4.073
23/SP SPRING 2023								
EVIDENCE	368	23	A+	I	4.0	4.0	17.20	
RESTORATIVE JUSTICE	662	21	A	I	3.0	3.0	12.00	
TRIAL ADVOCACY I	831	21	A	N	2.0	2.0	0.00	
NEGOTIATION	838	24	A+	N	3.0	3.0	0.00	
SOCIAL JUSTCE CONCNTRN SEM 2	843	21	CR	N	1.0	1.0	0.00	
MOOT COURT INTERCOLL COMPET	973	21	CR	N	2.0	2.0	0.00	
WRITING REQ'T FOR LAW 66221	998	30	M	N	0.0	0.0	0.00	
SPRNG BRK IMMIGRATN PRACTICUM	803	21	CR	N	2.0	2.0	0.00	
					17.0	17.0	29.20	4.171 4.088

Comments
Honors & Awards:
Milton D. Green Top Ten Citation - 1st Year Class 2021-2022
UC Hastings Honor Society
Thurston Society 2021-2022

C U M U L A T I V E T O T A L S

Cred. Att.	Cred. Cpt.	GPA Cred.	Grade Pts.	GPA
64.00	64.00	48.00	196.20	4.088

REJECT DOCUMENT IF SIGNATURE BELOW IS NOT CLEAR

Amy VanMullekom, Registrar

THE NAME OF THE COLLEGE IS PRINTED IN WHITE LETTERS ON THE FACE OF THE TRANSCRIPT. TRANSCRIPTS WITHOUT THIS NOTATION ARE UNOFFICIAL.

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to share my enthusiastic support for William Martel's application to serve as a judicial clerk in your chambers. Mr. Martel is a brilliant, highly motivated, and giving law student with a deep intellect, superior writing and analytical skills, and an exceptional work ethic. I have taught at the University of California College of the Law, San Francisco (formerly UC Hastings) for fifteen years, and Mr. Martel is one of the best students I have ever had the pleasure of working with. He is the type of star student that comes along once in a decade and reinvigorates one's commitment to teaching. I have no doubt that I will be hearing about his many achievements in the legal profession for years to come, and I give him my highest and most enthusiastic recommendation for a judicial clerkship.

There are so many positive things to say about Mr. Martel that it is difficult to know where to begin. I teach Contracts in the first-year curriculum and several comparative and international law courses in the upper division. I had the pleasure of having Mr. Martel in my Contracts section for the Spring 2022 term. He demonstrated the highest standards of professionalism throughout the semester. I "cold call" students in the course, and Mr. Martel was consistently well prepared when called on. He was regular volunteer contributor and enriched our discussions with thoughtful critiques on the cases. In his two written assignments during the term, he demonstrated superior issue spotting and legal analysis skills.

Mr. Martel's performance on my final exam placed him at the very top of my Contracts course. The final examination for this course was quite difficult. Success on the examination required thorough preparation, strong writing and organizational skills, and the ability to think clearly under pressure. Mr. Martel finished first out of 92 students and almost 30 points ahead of the second ranked student in the course (setting himself apart from even the best students to a degree I have only seen a few times in fifteen years of teaching). He was kind enough to allow me to use his exam as a model for other students. I re-read one of his exam essays before writing this letter, and it is nearly flawless. He spotted every legal issue and constructed concise, well-organized, and persuasive arguments to address them. The high quality of his legal analysis and prose was extraordinary for a completely closed book, timed exam. Indeed, there are only a few students who could draft an essay of the same quality even with unlimited time and access to notes and materials. I don't award grades of A+ every year, but I did so for Mr. Martel without a moment of hesitation.

Mr. Martel's outstanding course performance, as well as his collegiality and desire to support fellow students, prompted me to invite him to serve as a "Sack Fellow" in my Spring 2023 Contracts section. At UC Law SF, every first-year JD student has two five-unit courses in which the professor allocates additional time and resources to cultivate student legal analysis and writing skills. Students in these courses receive individualized feedback on two written assignments. Sack Fellows are high-performing upper division students who provide this individualized feedback and serve as mentors. I have very high standards for Sack Fellows and only invite students to serve in this capacity if I am certain they have both the academic skills and the temperament to support our 1Ls. I was very pleased when Mr. Martel accepted my invitation. His high quality, thoughtful, and timely feedback to students exceeded the high expectations I had when I invited him, even as he pursued an overload schedule of 17 credits that term. Many Sack Fellows struggle to balance positive and critical feedback, but Mr. Martel demonstrated a strong ability to provide the candid assessments students need while also encouraging them to take the next steps in their work. While Sack Fellows receive a modest stipend, I don't think that is what motivated Mr. Martel to accept the role. He seemed to genuinely enjoy the opportunity to mentor students and contribute to the law school community.

This last observation brings me to another of Mr. Martel's notable qualities – his strong sense of social responsibility and desire to serve others. In addition to his service as a Sack Fellow in Contracts and a teaching assistant in Legal Research and Writing, Mr. Martel is a student in our social justice concentration and worked as a summer law clerk in the Sonoma County Public Defender's Office. At the beginning of his second year at the law school, he approached me for advice about his 2L summer. Mr. Martel had received an offer from one of the top law firms in the Bay Area. He felt conflicted about accepting it because he worried about giving up a precious opportunity to continue his public service work. I was moved by his thoughtful deliberation, and we had a long conversation about his interests and professional goals. I shared my own experience working at Paul Weiss in New York and mentioned that he likely would have opportunities to do some pro bono work at his firm. I advised him to trust his instincts. But I also encouraged him accept the offer, noting that the experience and contacts would be quite valuable and that work for a large firm often opens doors in public service (as it did for me).

It is my understanding that Mr. Martel has compiled an academic record that places him at the very top of his class at UC Law SF. I also understand that he won the "Best Brief Award" for Legal Research and Writing in his first year. Several weeks ago, I had the pleasure of reviewing several legal briefs Mr. Martel researched and wrote over the past year. The two briefs demonstrate the same qualities that stood out to me in his writing for my Contracts course – exceptionally clear, persuasive legal analysis and concise, polished, error-free prose. I was not at all surprised to learn of Mr. Martel's many achievements and the further development of his legal writing. His academic and extracurricular record at UC Law SF is entirely consistent with his outstanding performance in my course.

Keith Hand - handk@uchastings.edu - letters@uchastings.edu
(415) 565

Finally, Mr. Martel is a true pleasure be around. He is diligent, open-minded, and respectful to those around him. He is the kind of person that a faculty member, fellow student, and employer can depend on when the workload gets heavy. I know he will continue to display these qualities as a legal professional.

Mr. Martel is the one student I am promoting for a clerkship this year. He has an excellent reputation, a proven track record, the drive to contribute and succeed, and all of the tools to be an outstanding clerk and lawyer. I have every confidence that if you schedule Mr. Martel for an interview, you will see in him the same great skills and potential that he has demonstrated to me and to many others at UC Law SF.

I would welcome the opportunity to talk with you in greater detail about Mr. Martel. If you would be interested in doing so, please don't hesitate to contact me by phone or E-mail. My work phone is 415-565-4803, and my E-mail address is handk@uchastings.edu.

Sincerely,

Keith J. Hand
Professor of Law

Thalia González
Professor of Law
Harry & Lillian Hastings Research Chair
Senior Scholar, UCSF/UC Law SF Consortium on Law, Science & Health Policy

UC Law San Francisco | 200 McAllister Street | San Francisco, CA 94102
phone 628 227 0919 | gonzalezt@uchastings.edu | uchastings.edu

Dear Honorable Judge:

I am delighted to write a letter of recommendation reflecting my overwhelming support for William Martel's application to be a judicial clerk in your chambers. It is without any hesitation that I enthusiastically support his application and share my reflections and experiences with Mr. Martel. Simply put, he is a professional, talented, thoughtful, and highly motivated law student with excellent writing and analytical skills. Though I have recently joined the University of California College of the Law, San Francisco (formerly UC Hastings) faculty, I have been a legal academic for fifteen years. I would isolate Mr. Martel as one of the best students not only in my courses, but also with whom I have worked with as a research assistant. I met Mr. Martel within the first few days that I was on campus and was immediately impressed by his acumen and interest in my research—he asked probing questions about areas that do not always draw student attention. As these initial interactions have borne out over the year, Mr. Martel is student who brings great thoughtfulness to his work and genuine interest in learning. He is highly motivated by intellectual curiosity and a commitment to excellence. I look forward to following his legal career and know he will be a shining star in whatever pathway he follows.

Before discussing Mr. Martel's skills as a research assistant, I would like to reflect on his academic performance in the classroom. At the University of California College of the Law, San Francisco I teach Constitutional Law I and multiple upper division courses. I am a faculty co-director of the Center for Racial and Economic Justice and a Senior Scholar in the UCSF-UC Law Consortium Law, Science, and Health Policy. In addition to my tenured faculty teaching position at the University of California College of the Law, San Francisco, I have held a research appointment at Georgetown University Law Center since 2017. All of this is to say, I am quite familiar with excellent students and my remarks about Mr. Martel should be understood in this context.

As his overall academic record reflects, Mr. Martel is at the very top of his class. He won the "Best Brief Award" for Legal Research and Writing in his first year and served as a teaching fellow for a first-year Contracts section. These are not isolated accolades for Mr. Martel. His achievements in the larger law school community are consistent with his outstanding performance in my courses. This year, I had the pleasure of Mr. Martel enrolling in two of my courses: Race, Racism, and American Law (Fall 20232) and Restorative Justice (Spring 2023). In each of these courses his performance earned him the highest grade.

In Race, Racism and American Law, I "cold call" students, and Mr. Martel was always well prepared when called on. His analysis of the doctrine was clear and consistent. Additionally, he artfully invited his peers to participate in discussion, often posing provocative questions that yielded significant interaction. In this manner, I would characterize Mr. Martel's role in the classroom as one of a leader. Unlike some students who view participation or leadership as a constant performance—that can disengage others—Mr. Martel was reflective and choose his interventions in the larger discussions with care.

In the three writing assignments required during the term, Mr. Martel demonstrated a superior command of the doctrine, ability to craft arguments, and develop normative claims. An additional assignment in the course required students to work collaboratively and independently—from the selection of materials for a specific session to teaching these materials to the entire class. Though there were no assigned leaders for each cohort, it was clear to me that Mr. Martel was the unspoken leader in his group. In addition to skillfully co-teaching on the selected topic, the group prepared an external set of resources to scaffold that day's session. It is such "above and beyond" excellence that I have seen Mr. Martel exhibit as my research assistant. And, I now know it was his idea to create these resources.

In addition to excellence during the term, Mr. Martel's performance on the final examination placed him at the top of the class. His final examination (open book, timed, six questions) was quite difficult. To be successful on an examination of this nature requires not only mastery of the course material but the ability to think critically and synthesize ideas in a highly organized manner. While one might assume open book creates ease, it is often quite challenging for students as they struggle to distill central ideas and arguments while remaining responsive to the questions posed. In re-reading his examination before writing this letter my reflection on the answers are quite simple, they were exceptional.

Mr. Martel's superb course performance, as well as his intellectual curiosity and collegiality, prompted me to invite him to be a research assistant. In this role, he has been even more outstanding. There are simply too many examples for me to describe! Mr. Martel has approached every assignment with thoughtfulness and attention to detail. And—no matter how large or small—his professionalism has been clear. Before each assignment, we meet and Mr. Martel takes careful notes and asks specific questions. He then checks in as needed with me for any clarification, not in a burdensome way, and returns to me high quality work on or before the date we agreed upon it was due. As we have been working together now for multiple months, Mr. Martel has also developed keen insights as to the robust portfolio of work that I maintain and checks in, without prompting, to see if there are smaller tasks that I need taken off my plate.

I would like to share one example of his professionalism and attention to detail that occurred last month. With very little notice from the producer, I was invited to speak as an expert commentator on PBS NewsHour. While we are all used to working under short deadlines, the timing was exacerbated by the fact that I was in Baltimore to give the keynote at a conference at Johns Hopkins University. I sent Mr. Martel a quick email asking him to send me his existing research on pending and recently passed legislation for a media call. I did not identify it was for PBS NewHour specifically. He replied to my email in minutes and within a few hours had sent me not only the prior research, but updated it (without my asking), adding short parentheticals about each law, including its current status in the legislative process. He also organized the legislation by topical areas. His quick response and additional thinking, again without prompting, was used not only by me in the interview but by PBS NewsHour in a visual they created for the segment. This is not an isolated instance where Mr. Martel's work was invaluable to me. I am confident in stating that he will be strong, reliable, and independent law clerk who can keep things moving smoothly in a busy chamber.

Mr. Martel's research and writing skills are not limited to discrete assignments. He has worked on sections of four articles, including first round technical above-the-line drafting, as well as data analysis and drafting of "plain language" text for a report for a grant funded project. I have been so impressed with Mr. Martel's work, that this summer we are co-authoring an essay in the area of education law. While some faculty regularly write with their research assistants, this is not my standard

practice as the areas in which I work do always lend themselves to collaboration with less experienced scholars. Mr. Martel has shown me that his work is of this caliber I expect and I look forward to developing this manuscript.

Turning to briefly to Mr. Martel's performance in another course, Restorative Justice, I was also able to appreciate his high-quality research and writing skills. In this upper division seminar, Mr. Martel met his law school writing requirement with the seminar paper. Taking an ambitious route with his paper, he decided to employ a modified social science methodology to code the content of victim impact statements from parole hearing transcripts and analyze their restorative efficacy. When Mr. Martel first introduced this topic in class—as one of five scaffolded assignments in the term— I was candidly dubious about his potential to complete the analysis and interlock it with a substantive theoretical grounding in one term. We met multiple times throughout the term as he grappled with the more challenging aspects of the project and I lent assistance on the empirical analysis design. I am pleased to say, Mr. Martel proved me wrong and earned the highest grade in the course. I believe his paper is a valuable contribution to the literature and I have offered to help him finalize it for submission for publication in a law review.

My final reflections about Mr. Martel's skills as a future law clerk are about who he is as a person. He is trustworthy, committed to justice, and highly values professional relationships. He understands what is means to be hard-working, open-minded, and respectful. He can bring levity to a situation when it is warranted and quiet deliberation when that is what is needed. Simply put, he is collegial, humble, and a pleasure to engage with. Each of these skills will serve him well in your chambers. While Mr. Martel is confident in his work, his commitment to excellence never diminishes the work of others. I have observed his working relationship with my other two research assistants and it is clear that he has sharp interpersonal skills and a keen understanding of how to contribute in a team, knowing when to step up and step back. Again, a valuable asset as a law clerk and legal professional.

Thank you for the opportunity to reflect on Mr. Martel's qualifications to serve as a law clerk. He is the only student I am supporting this year and if you have any questions about his qualifications or experience, please do not hesitate to contact me. I can be reached at 480-707-8894 or gonzalezt@uchastings.edu.

Sincerely,

Thalia González
Professor of Law
Harry & Lillian Hastings Research Chair
Co-Director, Center for Racial and Economic Justice

COUNTY OF SONOMA

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BRIAN MORRIS
Public Defender

Dear Honorable Judge,

Will Martel is an extraordinary law student who would be an exceptional clerk. I believe there are two things that set Will apart from other law clerks I have worked with that are likely not conveyed by his excellent grades and sterling resume.

First, he is an extraordinarily talented writer who produces attorney caliber work. In all the assignments I gave him, he returned motions that could be filed without any edits. More impressively though, those motions were frankly better than the average attorney work product I see. Will's writing is so good because he is extremely hardworking and self-motivated. Will voraciously completed every assignment I gave him well before any deadline I could reasonably suggest, and he continued to work on a few additional matters once school had started and his time with us had ended. Will quickly understood new concepts, always asked questions when he need more background. As a supervisor, I particularly appreciated how he would solve problems that came up independently, but still had the humility to check to be sure he had come to the correct conclusion. He had no significant background in criminal law when he came to our office but was immediately able to learn all of the new concepts and produce very high-quality work. This intellectual versatility truly separates him from other clerks I have worked with in the past.

Second, Will is incredibly pleasant to work with. He has no ego. He integrated seamlessly into our program with clerks who had been there for years, and immediately made friends. While many people in his position would be bragging about their accomplishments and accolades, I only learned about them when he sent me his resume. He was willing to take any assignment no matter how mundane or difficult. He would approach a document review task with the same vigor as a crafting a novel motion. He was also always willing to help others, but in a kind and friendly way and was never condescending. In sum he is an excellent addition to any team and will may any group better.

Will has my strongest possible recommendation because of how versatile and skilled he is in legal research and writing and how well he works as part of a team.

Sincerely,

Alexander Aumiller-Twigg

WILL MARTEL

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WRITING SAMPLE

The attached writing sample is an excerpt from a brief I submitted for the David E. Snodgrass Intramural Moot Court Competition. The case was a hypothetical appeal to the United States Supreme Court from the Fifth Circuit's decision in *Hope v. Harris*, No. 20-40379 (5th Cir. 2021). Mr. Hope challenged the constitutionality of his twenty-seven-year imprisonment in solitary confinement. The question presented for the competition was:

> Under the Eighth Amendment, does prolonged solitary confinement constitute cruel and unusual punishment *per se* when prison officials isolate a person in physically and psychologically dangerous conditions for an extended period of time?

I represented the Respondent, Mr. Dennis Wayne Hope. This sample is not edited by others and is entirely my own work.

I. RESPONDENTS VIOLATE THE EIGHTH AMENDMENT BY SUBJECTING HOPE TO PROLONGED SOLITARY CONFINEMENT IN UNSANITARY AND DANGEROUS CONDITIONS.

The Eighth Amendment provides, "[e]xessive bail shall not be required . . . nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "The Amendment proscribes 'all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). This Court recognizes two approaches to analyzing an Eighth Amendment claim. The first is a categorical analysis, in which an entire class of punishment is found unconstitutional if it violates "the evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The second is a case-by-case analysis, which requires a claimant to prove (1) their conditions of confinement pose "objectively, a sufficiently serious" threat to their health or safety, and (2) prison officials acted with "deliberate indifference" to that threat. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

This Court should find all Respondents violated the Eighth Amendment because prolonged solitary confinement contravenes "the evolving standards of decency that mark the progress of a maturing society" and therefore constitutes cruel and unusual punishment *per se*. *See Trop*, 356 U.S. at 101. Even if this Court declines to endorse a *per se* rule, the particular conditions of Hope's confinement violate the Eighth Amendment because they pose "objectively, a sufficiently serious" threat to Hope's health and safety, and all Respondents acted with "deliberate indifference" to that threat. *See Farmer*, 511 U.S. at 834.

A. Prolonged Solitary Confinement Is Unconstitutional *Per Se* Because It Violates the Evolving Standards of Decency.

"This Court has held that the Eighth Amendment incorporates 'evolving standards of decency.'" *United States v. Briggs*, 141 S.Ct. 467, 472 (2020) (quoting *Kennedy*, 554 U.S. at 419).

A punishment is cruel and unusual if it violates "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. To determine if a punishment violates the evolving standards of decency, this Court considers (1) whether there is a consensus against the punishment and (2) whether prohibiting the punishment is consistent with this Court's understanding of the text of the Eighth Amendment. *Kennedy*, 554 U.S. at 419. This Court has applied this two-part test to declare certain punishments are too barbaric, and therefore "[are] not weapon[s] that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be." *Trop*, 356 U.S. at 93. This Court has held, for example, a state may not execute an intellectually disabled person because doing so "is nothing more than the purposeless and needless imposition of pain and suffering." *Atkins*, 536 U.S. at 319. Likewise, the prolonged solitary confinement inflicted on Hope is a "purposeless and needless imposition of pain and suffering." *Id.*

Prolonged solitary confinement violates the evolving standards of decency and is therefore unconstitutional. Hope's conditions of confinement reflect the use of prolonged solitary confinement across the country, offering this Court its first opportunity to evaluate the constitutionality of the practice. *See Davis v. Ayala*, 576 U.S. 257, 286–87 (2015) (Kennedy, J., concurring) (requesting this Court examine and reject the practice of prolonged solitary confinement); U.S. Dep't of Just., *Report and Recommendations Concerning the Use of Restrictive Housing* 3 (2016). Hope is confined to a fifty-four square-foot cell for at least twenty-three hours per day. J.A. 31–32. He has only nine square feet of space to move around in his cell, and he has no human contact beyond interactions with prison staff. J.A. 32–33. The United Nations classifies these conditions as torture when they last longer than fifteen consecutive days. G.A. Res. 70/175,

Rule 44, at 17 (Dec. 17, 2015). Hope has suffered in these conditions for nearly thirty years. J.A. 31.

1. Legislative action and professional agreement establish a consensus against prolonged solitary confinement.

This Court begins its evolving standards of decency inquiry by searching for the "existence of objective indicia of consensus against [the punishment.]" *See Kennedy*, 554 U.S. at 422. In fact, this Court "should be informed by objective factors to the maximum possible extent . . . before bringing its own judgment to bear on the matter." *Enmund v. Florida*, 458 U.S. 782, 788–89 (1982). State legislative action and professional agreement are strong indicators of a consensus against a punishment. *Kennedy*, 554 U.S. at 421; *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

"[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312 (quotations omitted) (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). State legislatures provide an important window into shifts in penal practices. *See id.* A review of state legislatures demonstrates a growing consensus against prolonged solitary confinement.

Noting the significant cruelty of solitary confinement, many states have taken action to ban or limit the use of the punishment inflicted on Hope. In fact, six states prohibit the use of solitary confinement for longer than fifteen to thirty days.[1] Eleven state legislatures recently introduced similar restrictions, and two of those efforts ended with non-legislative plans to limit the practice.[2]

[1] Colo. Rev. Stat. Ann. § 17-26-303 (West 2022) (fifteen days); Conn. Gen. Stat. Ann. § 18-96b (West 2022) (fifteen days); N.J. Stat. Ann. § 30:4-82.5 (West 2022) (twenty days); N.Y. Correct. Law § 137 (McKinney 2022) (fifteen days); Del. Dep't of Corr., *Elimination of Restrictive Housing in DOC* 1 (2020) (fifteen days); Phaedra Haywood, *Has New Mexico Corrections Department Limited Use of Solitary Confinement?*, Santa Fe New Mexican (Dec. 18, 2021), https://www.santafenew mexican.com/news/local_news/has-new-mexico-corrections-department-limited-use-of-solitary-confinement/article_77476ce4-5485-11ec-b32e-47a54ca5ab29.html (thirty days).

[2] A.B. 2632, 2021–22 Reg. Sess. (Cal. 2022) (vetoed by Governor with directions for California Department of Corrections and Rehabilitation to develop its own plan to limit solitary confinement); S.B. 108, Gen. Ass. of Va., 2022

An additional twelve states outright prohibit the use of solitary confinement on certain populations, such as juveniles, pregnant women, or people with mental illnesses.[3] In total, twenty-eight states have taken action to prohibit or restrict solitary confinement. The substantial legislative action against solitary confinement demonstrates a consensus against the punishment Respondents inflicted on Hope. Additionally, the current trend of prohibiting or restricting prolonged solitary confinement demonstrates the consensus is growing. Because this Court relies heavily on state legislatures to establish a consensus against a type of punishment, the substantial legislative action is strong evidence of a consensus against prolonged solitary confinement. *See Atkins*, 536 U.S. at 312.

For further evidence of a consensus against a punishment, this Court considers the "the views that have been expressed by respected professional organizations." *Thompson v. Oklahoma*, 487 U.S. at 830 (finding the views of the American Bar Association and the American Law Institute evinced a consensus against the death penalty for juveniles).

Leading American medical, legal, and correctional organizations recognize the inhumanity and danger of prolonged solitary confinement. The American Public Health Association found

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Sess. (Va. 2022) (amended to direct Department of Corrections to study its use of solitary confinement); S.B. 3344, 31st Leg. (Haw. 2022); H.B. 615, 2022 Reg. Sess. (Ky. 2022); H.B. 1756, 67th Leg., 2022 Reg. Sess. (Wash. 2022); H.B. 4822, W. Va. Leg., 2022 Reg. Sess. (W. Va. 2022); H.B. 5740, Gen. Ass., Jan. Sess. 2021 (R.I. 2021); L.D. 696, 130th Leg., 1st Reg. Sess. 2021 (Me. 2021); S.B. 685, Gen. Ass., 2021 Sess. (Pa. 2021); S.B. 1617, 54th Leg., 2d Reg. Sess. (Ariz. 2020); H.B. 0259, 100th Gen. Ass. (Ill. 2019).

[3] Ark. Code Ann. § 12-29-118 (West 2022) (juveniles); Ark. Code Ann. § 12-32-104 (West 2022) (inmates who are pregnant or recently gave birth); Ga. Code Ann. § 42-1-11.3 (West 2022) (inmates who are pregnant or recently gave birth); La. Stat. Ann. § 15:905 (West 2022) (juveniles); Md. Code Ann., Corr. Servs. § 9-601.1 (West 2022) (pregnant inmates); Md. Code Ann., Corr. Servs. § 9-614.1 (West 2022) (juveniles); Minn. Stat. Ann. § 243.521 (West 2022) (people with mental illness); Mont. Code Ann. § 53-30-703 (West 2022) (inmates who are pregnant or recently gave birth); Mont. Code Ann. § 53-30-720 (West 2022) (juveniles); Neb. Rev. Stat. Ann. § 83-173.03 (West 2022) (pregnant inmates, people with mental illness or traumatic brain injury, juveniles); Or. Rev. Stat. Ann. § 169.750 (West 2022) (juveniles); W. Va. Code Ann. § 49-4-721 (West 2022) (juveniles); Prisoners' Legal Servs. of Mass., *Criminal Justice Reform Act (CJRA) Reforms and Regulations*, https://plsma.org/find-help/solitary-confinement/ (last visited Oct. 15, 2022) (people with mental illness); Chuck Sharman, *Michigan DOC Eases up on Pregnant Prisoners* (2021), https://www. prisonlegalnews.org/news/2021/nov/1/michigan-doc-eases-pregnant-prisoners-limits-shackles-and-solitary-confinement/ (pregnant inmates); Am. Civ. Liberties Union, *Groundbreaking Federal Consent Decree Will Prohibit Solitary Confinement of Youth in Mississippi* (2021), https:// www.aclu.org/press-releases/groundbreaking-federal-consent-decree-will-prohibit-solitary-confinement-youth (juveniles).

"[p]unitive segregation should be eliminated," noting "[m]ultiple professional organizations and human rights bodies have taken positions supporting the restriction or abolition of solitary confinement."[4] The Commission on Safety and Abuse in America's Prisons—a diverse group of civic leaders, correctional administrators, advocates, law enforcement professionals, and others—recommends prison officials "[e]nd conditions of isolation" and "[e]nsure that segregated prisoner[s] have regular and meaningful human contact and are free from extreme physical conditions that cause lasting harm." John J. Gibbons & Nicholas de Belleville Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 Wash. U. J. L. & Pol'y 385, 405 (2006). The American Bar Association asserts "while it may be necessary physically to separate prisoners . . . that separation does not necessitate [] social and sensory isolation[.]"[5] In recent years, circuit courts have noted the professional consensus against prolonged solitary confinement. *See, e.g., Porter v. Pennsylvania Dep't of Corr.*, 974 F.3d 431, 441–42 (3d Cir. 2020); *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019). The unanimity of professional organizations against the conditions suffered by Hope further indicates the consensus against prolonged solitary confinement.

2. This Court's precedent and the history of the Eighth Amendment demonstrate prolonged solitary confinement is unconstitutional.

"[C]onsensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual." *Graham v. Florida*, 560 U.S. 48, 67 (2010). "[I]t is for [this Court] ultimately to judge whether the Eighth Amendment permits the imposition of" solitary confinement. *Kennedy*, 554 U.S. at 434 (quoting *Enmund*, 458 U.S. at 797). To make that

[4] Am. Pub. Health Ass'n, *Solitary Confinement as a Public Health Issue* (2013), https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue.
[5] Am. Bar Ass'n, *ABA Cites Growing Concerns About Solitary Confinement*, Washington Letter (Mar. 2014), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/governmental_affairs_periodicals/washingtonletter/2014/march/solitary/.

determination, this Court looks to "controlling precedents and the Court's own understanding and interpretation of the Eighth Amendment's text." *Graham*, 560 U.S. at 61.

To determine whether the Eighth Amendment prohibits prolonged solitary confinement, this Court must apply its "own understanding of the Constitution and the rights it secures." *Kennedy*, 554 U.S. at 434. "The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." *Graham*, 560 U.S. at 59. The question, then, is whether the Framers would have considered the Eighth Amendment to proscribe prolonged solitary confinement in conditions such as those suffered by Hope. A historical analysis reveals the current practice of solitary confinement—characterized by its conditions, duration, and widespread use—did not exist until the late twentieth century. The Framers of the Eighth Amendment did not contemplate the current practice of solitary confinement, and it is not constitutionally enshrined.

The Eighth Amendment was ratified in 1791, and its authors' exclusive concern was the "prevention of torture." U.S. Const. amend. VIII; *Furman v. Georgia*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting). Noting this intent, some members of this Court have been hesitant to find punishments unconstitutional if they were not "impermissibly cruel at the time of the adoption of the Eighth Amendment." *Furman*, 408 U.S. at 380 (Burger, C.J. dissenting) (noting the death penalty was not considered torturous at the time of the adoption of the Eighth Amendment); *McGautha v. Cal.*, 402 U.S. 183, 226 (1971) (Black, J., separate opinion) (arguing the Eighth Amendment "cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law . . . at the time the Amendment was adopted").

The prolonged solitary confinement inflicted on Hope—involving nearly thirty years of severe social isolation in extremely cramped conditions for almost twenty-four hours per day—

was not a common or accepted penal practice until the late-twentieth century. J.A. 31–32; Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement,* 23 N.Y.U. Rev. L. & Soc. Change 477, 494–95 (1997). The authors of the Eighth Amendment could not have contemplated its application to prolonged solitary confinement, since that penal practice did not develop for over 150 years. *See* Haney & Lynch, *supra*, at 494–95. In fact, American prisons only began using solitary confinement—of any length––in the late-eighteenth century. *Id.* at 483. At the time of the Eighth Amendment's ratification, solitary confinement was in its early stages, and judges, journalists, and penal experts doubted its efficacy. *Id.* States across the country continued to experiment with solitary confinement through the nineteenth century. *Id.* at 483–84. However, by the beginning of the twentieth century, states had almost entirely abandoned the practice, noting its cruelty and ineffectiveness. *Id.* at 485–87; *see In re Medley*, 134 U.S. 160, 168 (1890) (noting that, in the mid-nineteenth century, "solitary confinement was found to be too severe").

Unlike other punishments, prolonged solitary confinement was not a common or accepted practice at the time of the Eighth Amendment's ratification, nor is it enshrined elsewhere in the Constitution. *See In re Medley*, 134 U.S. at 494–95; *Furman*, 408 U.S. at 380 (Burger, C.J., dissenting) (noting references to the death penalty in the First and Fifth Amendments); *McGautha*, 402 U.S. at 226 (Black, J., separate opinion) (noting the accepted use of the death penalty at the time the Eighth Amendment was ratified). In fact, this Court has noted the particular cruelty of solitary confinement. *In re Medley*, 134 U.S. at 168 (noting the deleterious effects of solitary confinement). Prohibiting prolonged solitary confinement, a punishment characterized by mentally and physically agonizing conditions, J.A. 31–33, aligns with the Eighth Amendment's

purpose of prohibiting torturous punishments. *See Furman*, 408 U.S. at 377 (Burger, C.J., dissenting).

Prolonged solitary confinement violates the evolving standards of decency. State legislative action and professional organizations demonstrate a strong and growing consensus against prolonged solitary confinement, and this Court's interpretation of the Eighth Amendment supports prohibiting the practice. Prolonged solitary confinement is unconstitutional *per se*, and Hope's nearly thirty-year isolation violates the Eighth Amendment.

B. Even if Prolonged Solitary Confinement Is Not Unconstitutional *Per Se,* Hope's Particularly Long, Unsanitary, and Dangerous Conditions of Confinement Violate the Eighth Amendment.

In addition to considering categorical challenges to types of punishment, this Court analyzes Eighth Amendment challenges to particular conditions of confinement under a separate case-by-case analysis. *See, e.g., Farmer*, 511 U.S. at 834; *Wilson v. Seiter*, 501 U.S. 294, 296–97 (1991). Under this case-by-case approach, conditions of confinement violate the Eighth Amendment if (1) they pose "objectively, a sufficiently serious" threat to an incarcerated individual's health or safety, and (2) prison officials act with "deliberate indifference" to such health or safety threat. *Farmer*, 511 U.S. at 834. Courts refer to these two elements as the objective and subjective prongs of the analysis. *See, e.g., Johnson v. Prentice*, 29 F.4th 895, 904 (7th Cir. 2022); *Porter v. Clarke*, 923 F.3d at 355.

1. The dangerous and unsanitary conditions of Hope's prolonged solitary confinement pose a substantial risk of serious harm.

Hope's conditions meet the objective prong because his confinement poses "a sufficiently serious" threat to his health and safety. *Farmer,* 511 U.S. at 834. A threat to health or safety is sufficiently serious if it "result[s] in the denial of the minimal civilized measure of life's necessities[.]" *Id.* at 834 (quotations omitted). Prison officials "must provide humane conditions

of confinement . . . and take reasonable measures to guarantee the safety of the inmates." *Id.* at 832 (quotations omitted). The length of confinement is an important factor because conditions "might be tolerable for a few days and intolerably cruel for weeks or months." *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978). Hope's conditions of confinement pose substantial risks to his physical and psychological health, and he has been exposed to those conditions for nearly thirty years. J.A. 31.

Several circuit courts have considered whether prolonged solitary confinement alone creates a sufficiently serious threat to a person's health and safety. *See, e.g., Porter v. Pa.*, 974 F.3d at 441; *Porter v. Clarke*, 923 F.3d at 355. The Third and Fourth Circuits have held prolonged solitary confinement creates a substantial risk of harm. *See Porter v. Pa.*, 974 F.3d at 441; *Porter v. Clarke*, 923 F.3d at 355. The Third Circuit noted, "virtually *everyone*" exposed to sensory deprivation is harmed. *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) (emphasis in original). Other circuits hold prolonged solitary confinement contributes to the risk of harm, but a claimant needs to allege personal and specific deprivations to satisfy the objective prong. *See Isby v. Brown*, 856 F.3d 508, 522 (7th Cir. 2017) (holding claimant must provide evidence of specific and individualized harms); *Quintanilla v. Bryson*, 730 F. App'x 738, 747 (11th Cir. 2018) (holding isolation in unsanitary conditions created a substantial risk of harm). No circuit has directly held prolonged solitary confinement alone does *not* create a serious and substantial risk of harm. *See Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 763–64 (10th Cir. 2014) (noting conditions of solitary confinement could establish a constitutional claim, despite finding thirty-year isolation was not unconstitutional because inmate posed significant security threat).

Hope's conditions of isolation pose a substantial risk of serious psychological harm, and he has been subjected to those conditions for almost thirty years. J.A. 31–32. Solitary confinement

of any length can cause psychosis, PTSD, paranoia, impulse control issues, insomnia, depression, and other psychological harms. Kayla James & Elena Vanko, *The Impacts of Solitary Confinement* 1–2 (2021). The risk of psychological harm increases in frequency and severity the longer a person suffers in isolation. *Id*. Hope himself suffers from insomnia, anxiety, depression, thoughts of suicide, and visual and auditory hallucinations. J.A. 34, 37–38. The cacophony of noise in the unit prevents Hope from sleeping for more than thirty minutes at a time. J.A. 38. From 2012 to 2018, Respondents moved Hope to over 263 different cells, many of which were unsanitary. J.A. 36. The disturbance from these frequent moves to unhealthy conditions contributed to Hope's anxiety and insomnia. J.A. 43. Hope's conditions of confinement cause many forms of psychological harm. *See* J.A. 31.

Hope's conditions of confinement also create a substantial risk of serious physical harm. People subjected to solitary confinement are 6.9 times more likely to commit acts of self-harm and 6.3 times more likely to commit potentially fatal acts of self-harm. Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am. J. Pub. Health 445–46 (2014). Hope has watched many other people in the SHU harm themselves and take their own lives and Hope himself has contemplated suicide. J.A. 38. Additionally, Respondents confined Hope in cells covered in feces, urine, and black mold. J.A. 36. These unsanitary conditions pose a serious risk to Hope's health. Hope is also exposed to chemical agents such as tear gas, pepper spray, and pepper balls, often for a prolonged period of time because Respondent Rehse refuses to turn on exhaust fans to clear the gas. J.A. 34. On one occasion, Respondents left Hope naked and covered in pepper spray for eight days. J.A. 36. Exposure to chemical agents, especially without subsequent cleaning or treatment, poses a significant threat to Hope's health. Hope's conditions create a serious risk of self-harm and pose a substantial threat to his health and safety.

This Court should hold the objective prong is met because Hope's near thirty-year isolation in dangerous and unsanitary conditions creates a substantially serious risk of physical and psychological harm.

2. Respondents confined Hope in dangerous and unsanitary conditions with reckless indifference to his health and safety.

Hope's *pro se* complaint meets the subjective prong because he sufficiently alleges all Respondents acted with "deliberate indifference to [his] health or safety." *Farmer*, 511 U.S. at 834. "[D]eliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Farmer*, 511 U.S. at 836. Reckless indifference "can be inferred from the fact the risk of harm is obvious." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). A risk is obvious if the risk is "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past." *Farmer*, 511 U.S. at 842. All Respondents acted with reckless indifference to the substantial and obvious risks of Hope's confinement.

All Respondents were aware of the conditions Hope was subjected to. J.A. 30–31. All seven Respondents are prison officials employed at the facility where Hope is incarcerated. J.A. 30–31. Hope sufficiently alleges that all seven Respondents are aware of his conditions and treatment. J.A. 30–31. The physical and psychological dangers of Hope's conditions are "well established in both case law and scientific and medical research." *Porter v. Pa.*, 974 F.3d at 441. Additionally, because prison officials possess unique and intimate knowledge of the risks of solitary confinement, they cannot claim ignorance of those obvious dangers. *See id.* at 447. A prison official would need to actively disregard the ongoing penological discourse to ignore these dangers, as "[a] wide range of researchers and courts have repeatedly described the serious risks associated with solitary confinement." *Id.* at 446. In fact, organizations run by and representing prison officials have noted the dangers of solitary confinement and commented on the need to limit

the practice. *See* Ass'n of State Corr. Adm'rs & The Liman Program, Yale L. Sch., *Time in Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* 54–59 (2015). Because Hope's isolation has lasted nearly three decades, the risk of harm was especially obvious to Respondents. *See Porter v. Pa.*, 974 F.3d at 447 (holding prison officials are necessarily aware of the risks posed by solitary confinement lasting thirty-three years). In fact, Hope alleges all Respondents "are aware of the harmful effects of long-term isolation and the toll it takes on the human body and brain." J.A. 43. Despite their knowledge and awareness of the serious risks posed to Hope's health and safety, all Respondents "work together to ensure Mr. Hope continues to be subjected to these inhumane conditions." J.A. 43–44. All Respondents were aware of the obvious and substantial risks posed by the conditions of Hope's confinement, and all Respondents acted with reckless indifference to those risks. Hope's complaint meets the subjective prong and sufficiently states an Eighth Amendment claim.

Hope's *pro se* complaint states an Eighth Amendment claim against all Respondents because prolonged solitary confinement violates the evolving standards of decency and is unconstitutional *per se*. Even if this Court declines to endorse a *per se* rule, Hope's particular conditions of confinement pose substantial physical and psychological dangers that threaten his health and safety. All Respondents were aware of the obvious dangers posed by Hope's conditions, and all acted with reckless indifference to those risks. Hope's *pro se* complaint sufficiently alleges an Eighth Amendment claim against all Respondents.

Applicant Details

First Name	**Eliza**
Last Name	**Martin**
Citizenship Status	**U. S. Citizen**
Email Address	**elizamartin@uchicago.edu**
Address	**Address** Street **5454 South Shore Drive, Apt. 524** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**5129834756**

Applicant Education

BA/BS From	**Rice University**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Legal Forum**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Davidson, Adam
davidsona@uchicago.edu
Macey, Joshua
jmacey@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Eliza Martin
5454 S. Shore Drive, Apartment 524, Chicago, IL 60615 | (512) 983-4756 | elizamartin@uchicago.edu

June 11, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sánchez:

I am a rising third-year law student at the University of Chicago Law School writing to apply for a clerkship in your chambers for the 2024–2025 term. I would welcome the opportunity to learn from your experience as a judge and apply my skills to help answer challenging legal questions.

Throughout law school and my prior experience in the Texas House of Representatives, I developed the ability to research and write on many different subject areas. As the Executive Articles Editor for *The University of Chicago Legal Forum* and as a Summer Associate at Skadden, I have experienced quickly familiarizing myself with complex and unfamiliar areas of law and critically analyzing legal arguments. My experience in the fast-paced Texas House strengthened my communication and organization skills as I navigated discussing complex and sensitive policy issues with a variety of distinct stakeholders including constituents, press, and other elected officials. These skills will enable me to assist substantially in drafting and editing judicial decisions, and clerking for you would be an incredible opportunity to develop my legal skills further. I look forward to continuing to apply and enhance these skills as a Summer Legal Intern for the Honorable Allison Clements, Commissioner for the Federal Energy Regulatory Commission.

I have attached my résumé, a writing sample, and my law school transcript. Letters of recommendation from Professors Adam Davidson and Joshua Macey will arrive under separate cover. Thank you for your time and consideration. I look forward to hearing from you.

Sincerely,

Eliza Martin

Enclosures

Eliza Martin

5454 S. Shore Drive, Apartment 524, Chicago, IL 60615 | (512) 983-4756 | elizamartin@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, IL
J.D. expected, June 2024
Journal: *The University of Chicago Legal Forum*, Executive Articles Editor
Defunding Cities: Reconsidering the Fiscal Sanctioning Measures of State Punitive Preemption Statutes, 2023 U. CHI. LEGAL F. (forthcoming).
Activities: Environmental Law Society, Latinx Law Students Association, American Constitution Society, Student Interview Committee for Faculty Hiring

Rice University, Houston, TX
B.A. in History and Political Science; Minor in Politics, Law and Social Thought, May 2019
Activities: Baker College, President
Student Judicial Programs Working Group
Honors: John Hutchinson Award for Service to Rice University
Distinction in Research & Creative Works for Undergraduate Thesis
National Hispanic Merit Scholar

EXPERIENCE

Federal Energy Regulatory Commission, Office of Commissioner Clements, Washington, D.C.
Legal Intern, Expected July 2023-September 2023

Skadden, Arps, Slate, Meagher & Flom, Chicago, IL & Houston, TX
Summer Associate, May 2022-July 2022 (Houston, TX); May 2023-July 2023 (Chicago, IL)

- Conducted analysis for a senior associate on capital market issues, including a review of a restructuring agreement in a client's acquisition of a major fund.
- Drafted documents, conducted research, and compiled interview outlines for attorneys working on pro-bono matters such as prisoner civil rights litigation and an asylum case.

Professor Joshua Macey, Chicago, IL & Remote
Research Assistant, June 2022-Present

- Supporting Professor Macey's research on law and policy issues related to the U.S. energy industry.
- Summarized case law on utility recovery of environmental disaster costs and sourced historical information regarding the development of the North American Electric Reliability Corporation.

Office of State Representative Donna Howard (HD-48), Austin, TX
Communications Director & Aide, June 2020-June 2021

- Produced and executed an integrated communications strategy to amplify policy goals and demonstrate areas of concern with certain state bills.
- Analyzed proposed legislation, shepherded bills through the legislative process, and wrote talking points on issues including power-grid failure, reproductive health access, and state budget decisions.

James Talarico for State Representative (HD-52), Williamson County, TX
Field Organizer, July 2020-November 2020

- Developed and executed a field plan in a district with over 200,000 residents to ensure re-election in a swing-district.

Thomas J. Watson Fellowship, Northern Ireland, Norway, South Africa, Mauritius
Fellow, July 2019-July 2020

- Researched caregiving that children-of-immigrants provide for their parents over their lifetimes and how this work changes during different life stages.

INTERESTS & SKILLS: hiking, reading fiction, live-music; data analysis (R, Excel), Spanish.

REJECT DOCUMENT IF SIGNATURE BELOW IS DISTORTED

THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Eliza Martin
Student ID: 12276181

Scott C. Campbell, University Registrar

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Program Status:Active in Program
J.D. in Law

External Education

William Marsh Rice University
Houston, Texas
Bachelor of Arts 2019

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	176
LAWS	30211	Civil Procedure William Hubbard	4	4	177
LAWS	30611	Torts Saul Levmore	4	4	177
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	181

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	176
LAWS	30411	Property Thomas Gallanis Jr	4	4	177
LAWS	30511	Contracts Bridget Fahey	4	4	176
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	181

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Adam Davidson	2	2	181
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	177
LAWS	40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	179
LAWS	43201	Comparative Legal Institutions Thomas Ginsburg	3	3	175
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	176

Summer 2022

Honors/Awards
The University of Chicago Legal Forum, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	43228	Local Government Law Lee Fennell	3	3	177
LAWS	53377	Big Problems Anup Malani David A Weisbach	3	3	179
LAWS	57013	Canonical Ideas in American Legal Thought William Baude Adam Chilton	3	3	178
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	179
LAWS	43282	Energy Law Joshua C. Macey	3	3	182
LAWS	53131	Reproductive Health and Justice Emily Werth	3	0	
LAWS	57013	Canonical Ideas in American Legal Thought William Baude Adam Chilton	2	2	178
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	176
LAWS	53404	The Role and Practice of the State Attorney General Michael Scodro Lisa Madigan	3	0	
LAWS	53432	Climate Change and the Law Hajin Kim Joshua C. Macey	3	3	182
LAWS	57013	Canonical Ideas in American Legal Thought William Baude Adam Chilton	2	2	178
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Send To: Eliza Martin
5454 South Shore Drive
Chicago, IL
60615

End of University of Chicago Law School

Date Issued: 05/31/2023

KEY TO TRANSCRIPT ON FINAL PAGE

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

Adam Davidson
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www.law.uchicago.edu/people/adam-davidson

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to recommend Eliza Martin for a clerkship in your chambers. I taught Eliza in Legal, Research, and Writing, a full-year course during her 1L year. Even as a 1L Eliza was a clear and concise writer who was able to identify and focus on the core of a legal issue. It was unsurprising that she received a 181, a strong A in Chicago's grading scheme, in my class. Indeed, it appears that Eliza is increasingly learning to implement the clarity and legal acumen she showed in my class in her other classes. Her transcript shows a clear trend of improvement from the beginning of her 1L year, and she now seems to consistently place herself above Chicago's 177 median.

Eliza is not always the most extraverted person. In part, I think that is because she does not always feel like she belongs in law school. But she should. She is the first member of her family to attend law school, and she grew up in Austin, Texas attending a school where the vast majority of students received free or reduced lunch. That experience led her to become politically involved as various political leaders threatened her school's funding or to take actions that would harm her undocumented classmates. She said that though her school did not have many material resources, her teachers believed in them and so she and the other students believed in and supported each other. Those experiences have clearly affected her professional path, as she has consistently sought to work to improve the lives of others. In college, she served in student government, working to improve her university's Title IX procedures and helping to secure a stipend for students who worked in student government, so that no student had to choose between serving the university and working a job to sustain themselves. After college, inspired by her own experience helping to support her father, she received a fellowship to study how children of immigrants support their families. And then she worked in the Texas legislature for Representative Donna Howard. For someone about to attend law school, her timing in the legislature was educationally fortuitous, as she had a front-row seat to the debate over and ultimately passage of SB8.

Though I said Eliza is introverted, I should be clear that does not mean she is closed off. She is happy to talk about her experiences, and she is particularly thoughtful as she reflects on what she has learned from them and how they motivate her today. She has developed an interest in the intersection of poverty and climate change, and she imagines that eventually this will culminate in a career either in energy policy, she specifically mentioned working for FERC, or in legal academia. To that latter end, she has focused on finding as many writing opportunities as she can during law school. This includes serving as a research assistant to one of our energy law professors, Joshua Macey, and taking one of our most difficult courses, Canonical Ideas in American Legal Thought, which is a full-year course designed to introduce students to the most prominent ideas in legal academia and have them produce a piece of publishable-quality scholarship.

I think that Eliza will make an excellent law clerk and will be a joy to have in chambers. I happily recommend her.

Joshua C. Macey
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
jmacey@uchicago.edu | *773-702-9494*

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to write this letter of recommendation in support of Eliza Martin. I know Eliza well. She worked as my research assistant in summer 2022 and has taken two of my classes. She would make an excellent law clerk. I recommend her without reservation.

Eliza was an outstanding research assistant. There has recently been a lot of scholarship considering the many ways energy regulations operate at cross-purposes with climate policy, but there has been virtually no research about grid governance. I'm writing a paper arguing that energy regulators have outsourced the development of energy market rules to incumbent fossil fuel providers. I asked Eliza to dig through lengthy and complicated adjudications granting self-regulatory status to coalitions of electric utilities. Eliza spent the summer digging through open access transmission tariffs, which are the governing documents for self-regulatory organizations that develop energy market rules. These tariffs are typically thousands of pages long and poorly organized. Eliza created a database that shows which utilities own and operate the grid.

Eliza did an amazing job. To provide one example, she figured out that the utilities that have developed the process for building transmission lines to connect to wind and solar developments are vertically integrated. These utilities have invested billions of dollars to build fossil generating units that are only able to make a profit because transmission constraints allow them to exercise market power.

It was little surprise when Eliza wrote one of the strongest exams in my Energy Law class and one of the best papers I've supervised. For my climate change seminar, Eliza argued that rate regulated utilities that spend money lobbying against climate regulations are compelling their ratepayers to engage in political speech in violation of *Janus*. Rate regulated utilities have a legal right to a monopoly. Their revenues come from captive ratepayers who are rarely permitted to switch providers. When utilities spend ratepayer money lobbying against climate regulations, they force ratepayers to fund political positions. *Janus* held that similar behavior was unconstitutional in the labor context. This is an extremely sophisticated argument. It may be the most important paper I've supervised as a law professor. I have urged her to revise it and expect to see it published as an article in the next year.

I should also say a few things about Eliza's background. Eliza grew up in Austin, Texas. She is very close with her family, and she has told me that both of her parents have always are role models to her—especially in terms of how they engage with their family and community. Her father moved to the United States at sixteen. He did not speak English at the time but taught himself English and became a primary care physician who provides service to low-income communities. He traveled to the Rio Grande Valley on weekends to work in the Emergency Room because there weren't enough physicians in the Valley. He also is the primary source of income for her entire extended family and supports her uncles, aunts, and grandparents. Eliza plans to provide a similar level of emotional and financial care for my extended family.

Eliza went to an all-girls public middle and high school where seventy-five percent of students received free and reduced lunch. She was in the school's third-graduating class, and part of a minority of students who went on to attend four-year college. Eliza went on to study history and political science at Rice. While in college, her father had a mental-health breakdown that prevented him from working for over a year. Eliza ended up spending her free time working so that she could ease some of the financial pressures her family was facing. After her father recovered, she began participating in student government, where she helped reform Rice's Title IX procedures to improve support for survivors of sexual assault.

After Eliza graduated from college, she received the Thomas J. Watson Fellowship, which supported a year of international travel for an independent project. This Fellowship provided support for Eliza to conduct research on how the childcare that immigrant children receive at different life stages. As a Watson Fellow, Eliza studied how religious, state, and non-profit institutions support children of immigrants in their caretaking experience. She has told me that her interest in this issue was largely inspired by her experience caring for and supporting her father, who was an immigrant who had to teach himself English when he arrived in the United States as a sixteen-year-old. When she returned to the United States, she worked as a field organizer for Texas Representative, James Talarico, and then for Representative, Donna Howard during the 86th Legislative Session.

As I hope is clear, I think the world of Eliza. She is highly intelligent, humble, and deeply committed to her family and to public service. She would be a credit to any chambers. Please do not hesitate to contact me if you have any further questions.

Joshua Macey - jmacey@uchicago.edu

Sincerely yours,
Joshua C. Macey

Joshua Macey - jmacey@uchicago.edu

Eliza Martin
5454 S. Shore Drive, Apartment 524, Chicago, IL 60615 | (512) 983-4756 | elizamartin@uchicago.edu

I prepared the attached writing sample for my Legal Research and Writing Class at the University of Chicago Law School. For this assignment, I was asked to write a brief for defendant-appellee Davidson Datavault, LLC, on a fictional Article III standing claim in the Seventh Circuit. To create a 10-page writing sample, I omitted the Table of Contents and Authorities, Statement of Facts, Standard of Review, Statement of Jurisdiction, Conclusion, and Certificate of Compliance. This brief has not been edited by others.

The basic facts of the fictional scenario are as follows: Davidson Datavault, LLC ("Datavault") is a corporation that provides a digital vault for individuals and companies to store online usernames, passwords, and other details. Appellant Danny Midway ("Midway") is a business owner that sells apparel online. Following a regular system update, Datavault discovered that hackers were able to access its system. Immediately after this discovery, Datavault notified its customers of the data incursion. In the two years following the data incursion, no Datavault customer experienced fraudulent charges or any symptom of identity theft. Now, Plaintiff is alleging an injury from several voluntary actions that he took to mitigate an imagined risk of remote harm.

INTRODUCTION

Davidson Datavault, LLC ("Datavault") is committed to the protection of user data, and it acknowledges the critical public discussion around matters related to data privacy and protection. But these matters are for Congress and not at issue in this appeal. Instead, "we begin and end with standing." *Pierre v. Midland Credit Management, Inc.*, 29 F.4th 934, 936 (7th Cir. 2022).

The Constitution grants this court remedial power to address concrete, particularized, and actual or imminent injuries-in-fact. Article III does not grant this court expansive proactive power to address general, remote, and hypothetical injuries. If Americans would like Congress to enact a statute requiring companies to safeguard private information, Congress may exercise its legislative power on this issue. *See generally* Patrick J. Lorio, *Access Denied: Data Breach Litigation, Article III Standing, and A Proposed Statutory Solution*, 51 COLUM. J.L. & SOC. PROBS. 79 (2017). While statutory protection of private information could allow plaintiffs to recover mitigation costs following a data incursion, there is no existing statute that (1) transforms speculative injuries into concrete harm or (2) authorizes recovery for these imagined injuries. *Id.*

Instead, Plaintiff's claims arise from a limited set of facts. Two years after a data incursion on Datavault's systems during which hackers were only able to access Plaintiff's encrypted password, Plaintiff seeks to recover for self-induced "injuries" against hypothetical and remote future injuries. The complaint suffers from numerous fatal flaws, although none more so than the fact that Plaintiff cannot demonstrate that he suffered an actual injury from the data incursion, let alone that there is an imminent injury. Although Plaintiff's pleadings are extensive, they do not allege any financial, emotional, or future legal harm that the judiciary can redress. This theory of imaginary harm is the reason why the district court granted Datavault's motion to dismiss for lack of Article III standing. This court should affirm.

STATEMENT OF ISSUES

1. Whether Plaintiff ("Midway") has standing under Article III to pursue this lawsuit even though his own testimony demonstrates that Midway, as a matter of law, did not suffer a concrete, particularized, and actual or imminent, injury-in-fact.
2. Whether the district court correctly granted Datavault's motion to dismiss on the grounds that Plaintiff failed to demonstrate (1) a concrete financial or emotional injury, and (2) a substantial risk of future harm.

SUMMARY OF THE ARGUMENT

The district court correctly granted the district court's motion to dismiss for lack of Article III standing. In order to establish standing, a plaintiff must allege an injury-in-fact traceable to the defendant's conduct that the judiciary can redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Midway seeks to assert both present and future injuries but fails to establish facts demonstrating a justiciable controversy. Instead, Midway alleges general, future, and hypothetical injuries that are insufficient to confer standing under Article III. Specifically, Midway alleges that manufactured economic harm, speculative future injuries, and emotional distress are injuries-in-fact.

First, Midway seeks to manufacture concrete injuries in anticipation of future harm. Instead of alleging a concrete injury sufficient to establish standing, such as fraudulent credit charges or other symptoms of identity theft, Midway relies on mitigation expenses associated with a remote and hypothetical future harm. Midway has not suffered *any* concrete harm in the two-year period following the data incursion and can provide no evidence of otherwise impending harm from the data incursion.

Next, Plaintiff attempts to argue that he faces increased risk of identity theft and fraudulent credit card charges. Midway's allegation relies on a string of possibilities; hackers were able to download Midway's specific encrypted password, hackers could decrypt his password, and hackers could misuse this data. These possibilities fail to meet the standard for imminent harm. Accordingly, this Court should also find that any alleged loss of time and expense tied to speculative harm is not sufficient proof of injury.

Finally, Plaintiff alleges that the data incursion resulted in emotional distress. However, this Court forecloses such claims unless Plaintiff can claim a distinct concrete and non-emotional harm sufficient to constitute an injury-in-fact. Midway is unable to do so.

As Plaintiff fails to allege an injury-in-fact, this Court should affirm the district court's motion to dismiss for lack of Article III standing.

ARGUMENT

I. The District Court Correctly Granted the Motion to Dismiss Because Midway Lacks Article III Standing.

To satisfy Article III standing, a plaintiff "must show that (i) he suffered an injury-in-fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 U.S. 2190, 2203 (2021) (citing *Lujan*, 504 U.S. at 560–61). While this Court may affirm on any facts supported by the record, the plaintiff must "clearly" "allege facts" demonstrating each element. *Warth v. Seldin*, 442 U.S. 490, 518 (1975). Midway, alleges economic, emotional, and future injuries, but does not allege any injury sufficient to establish federal jurisdiction.

A. Midway Lacks Standing Because He Fails to Allege a Concrete or Imminent Economic Injury.

The Supreme Court interprets a "concrete injury" as one that "is real and not abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). Typical plaintiffs in data incursion cases meet this burden by proving that their identity or credit cards have been stolen and used, or that such injuries are likely to occur in the future. *See, e.g.*, *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015) (finding injury as thousands of shoppers reported fraudulent credit card charges stemming from single data incursion); *In re Adobe Sys., Inc. Privacy Litig.*, 2014 WL 4379916, *8 (N.D. Cal. 2014) (finding injury as personal information, including "names, passwords…and credit card numbers and expiration dates" had been misused through disclosure on the internet). Midway can do neither: he has not suffered a direct injury and cannot prove that such harm is imminent. R11. Instead, Midway alleges a concrete economic injury from voluntarily placing a temporary freeze on his credit report, changing usernames and passwords, and cancelling his credit card. As Midway manufactured standing in anticipation of a nonexistent and remote harm, the district court correctly dismissed the allegations as remote and hypothetical injuries. R 11.

1. The District Court Correctly Held that Plaintiff's Allegations of Concrete Economic Harm are Manufactured in Anticipation of Remote and Future Harm.

A plaintiff "cannot manufacture standing" through credit monitoring or other costly mitigation measures based on risk that "relies on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 410 (2013). While some circuits have held that any economic harm from precautionary measures of a "certainly impending" harm satisfies a concrete injury-in-fact, the Supreme Court explicitly repudiated the premise that any risk of harm

could confer standing: "a plaintiff seeking money damages has standing to sue in federal court *only* for harms that have in fact materialized." *Pierre*, 29 F.4th at 938 (citing *TransUnion*, 538 U.S at 2210) (rejecting reasoning in *Remijas* and *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016), where risk of future injury and mitigation measures in anticipation of imminent harm were sufficient to establish concrete injuries) (emphasis added). As Midway aptly recognizes, harm is distant as neither "he or any Datavault user experienced 'fraudulent charges or other symptoms of identity theft' following the Datavault" incursion. R11. Regardless, risk of future harm is not sufficient to satisfy standing without more evidence. *Ewing v. MED-1 Solutions, LLC*, 24 F.4th 1146, 1152 (7th Cir. 2022) (citing *TransUnion,* 141 U.S. at 2212–13) ("*TransUnion* makes clear that a risk of future harm, without more, is insufficiently concrete to permit standing to sue for damages in federal court.").

Midway's allegations of concrete economic injury from voluntarily actions—placing a temporary freeze on his credit report, changing usernames and passwords, and cancelling his credit card—are manufactured mitigation measures that rely entirely on the risk of harm. *See Clapper*, 568 U.S. at 410. While the data incursion may have created a risk that Midway would suffer harm, Midway cannot recover mitigation costs protecting against future harm from an alleged data breach. *See Ewing*, 24 F.4th at 1152.

B. Midway Alleges Speculative Chain of Possibilities That Do Not Establish an Increased Risk of Future Harm.

1. Midway's Allegations of Future Harm Are General and Remote.

Midway alleges an increased risk of identity theft and fraudulent credit card charges. Despite the *Clapper* rule that any contention of enhanced risk of future harm cannot be rooted in a "speculative chain of possibilities," Plaintiff's allegation asks the Court to engage an "attenuated

chain of inferences." *Clapper*, 568 U.S. at 414; 414 n.5. While this Court previously distinguished between the *Clapper* rule and data incursion cases *Remijas* and *Lewert*, it did so with absolute certainty that hackers successfully retained sensitive personal and unencrypted information: credit card numbers that could, and "sooner or later" would, be fraudulently used. *Remijas*, 749 F.3d at 693. In *Remijas*, this Court did not "need to speculate as to whether [the Neiman Marcus customers' credit-information had] been stolen and what information was taken." *Id.* In this case, Midway's allegation asks the Court to speculate as to whether their information was downloaded and whether the encrypted information can even be understood by the hackers.

Midway's allegations of future identity theft and charges rely on "speculation that the hacker: (1) read, copied, and understood their personal information; (2) intends to commit future criminal acts by misusing the information; and (3) is able to use such information to the detriment of the [Plaintiff]." *Riley v. Ceridian Corp.*, 644 F.3d 38, 41 (3d Cir. 2011). While the hackers gained access to the Datavault system and were "*able* to download" encrypted passwords, we do not know whether the hackers downloaded *any* information, let alone all the encrypted passwords necessary to access the sensitive personal information of users. R5 (emphasis added). Moreover, as Datavault passwords are encrypted, we do not know "whether the hacker, read, copied, or understood the data." *Riley*, 644 F.3d at 43. *See, e.g.*, *Remijas*, 794 F.3d at 693 (finding that unencrypted data "was in the hands of hackers" and used for fraudulent charges); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (finding plaintiffs met standing requirement through their allegations of harm stemming from the theft of a laptop containing their unencrypted personal data). As an injury-in-fact must be particularized, we do not know whether the hackers decrypted the passwords and selected—from ten thousand

Datavault accounts—Midway's personal vault. Finally, we do not know whether hackers will successfully use this information to steal Midway's identity or charge fraudulent purchases. *See Lujan*, 504 U.S. at 560 n.1 (holding that for an injury to be particularized, the "injury must affect the plaintiff in a personal and individual way."). The increased risk of future harm is too speculative and general to constitute an injury-in-fact.

2. The District Court Correctly Determined That Midway Is Not at Substantial Risk of Future Harm.

Midway contends that the cost of monitoring his financial accounts for threat of future harm is a concrete injury sufficient to establish injury-in-fact. R9. However, this Court recognizes a concrete economic injury from lost time only if there is a future risk of harm based on an "objectively reasonable likelihood" that a hacker can access the sensitive information and commit identity theft or fraud." *Lewert*, 819 F.3d at 965, 967; *Remijas*; 794 F.3d at 693 (citing *Clapper*, 568 U.S. at 1147). Whether the data incursion on Datavault's system exposes Plaintiff to a substantial threat of identity theft and fraudulent credit card charges "turns on two factors that derive from *Remijas*: (1) the sensitivity of the data in question…and (2) the incident of 'fraudulent charges' and other symptoms of identity theft." *Kylie S. v. Pearson PLC.*, 475 Supp.3d 841, 846 (N.D. Ill. 2020) (citing *Lewert*, 819 F.3d at 967).

First, all Plaintiff can plausibly demonstrate is that hackers were "able to download" encrypted passwords. R5. An encrypted password is not generally understood to be sensitive information. *See Remijas*, 794 F.3d at 690 ("sensitive information" is considered "social security numbers and birth dates…").[1]

[1] While Datavault's encryption technology may be susceptible to hackers, this is irrelevant given none of Datavault's customers have suffered any injuries in the *two years* since the breach. R4 n.1; R11.

Second, there is no evidence that the hackers downloaded the encrypted passwords, let alone that they accessed or misused the sensitive information. The incursion on Datavault occurred between September 1 and October 1, 2020. R5. In the *two years* since the data incursion, the Plaintiff has uncovered no evidence that any information—let alone *his* information—has been unencrypted, accessed, or misused. *See, e.g.*, *Beck v. McDonald*, 848 F.3d 262, 247–75 (4th Cir. 2017) (concluding that without a showing of misuse or a hacker's intent to misuse personal information, the court would have to engage in an attenuated chain of possibilities); *In re SuperValu, Inc.*, 870 F.3d 763, 767 (8th Cir. 2017) (explaining that "crucial to the outcome" in the appeal was one plaintiff alleging fraudulent charges on his credit card as a result of a the data incursion); *Reilly v. Ceridian Corp.*, 664 F.3d at 43 (finding that plaintiffs had not suffered an injury because there was not a misuse of their personal information). As only two of the ten companies that suffered data incursions in the coordinated attack from September 1 to October 1, 2020, can report incidents of identity theft, we can likely infer that the hackers (1) did not download Datavault data, or (2) cannot read, understand, or use the data. R5–7. Otherwise, hackers would have used Datavault's data as they did for the other two companies that suffered from the coordinated data incursion.

Plaintiff bears the "burden of establishing standing and cannot rest on . . . 'mere allegations,' but must 'set forth' . . . 'specific facts.'" *Clapper*, 568 U.S. at 411–12. Without a showing of misuse or a hacker's intent to misuse Plaintiff's personal information, this Court would have to "engage with the same 'attenuated chain of possibilities rejected by the Court in *Clapper*.'" *Beck*, 848 F.3d at 275 (citing *Clapper*, 568 U.S. at 414). There is a significant sequence of events between a corporation suffering a data incursion, and personal information ending up in the

hands of a malicious actor who can utilize the information to commit fraud or steal an identity. Plaintiff cannot establish that any of these events occurred.

3. Datavault's Provision of Free Credit and Identity-Theft Monitoring Services Is A Pragmatic Decision.

Datavault's offer of one-year credit and identity-theft monitoring services does not prove that Plaintiff is at an increased risk of future harm as "most of the time, courts 'exclude[ ] evidence of subsequent remedial measures as proof of an admission of fault.'" *Kylie S.*, 475 F.Supp.3d at 848 (quoting FED. R. EVID. 407). In *Remijas*, plaintiffs argued that defendant's offer of credit monitoring and identity theft protection conclusively demonstrated risk of future harm. 794 F.3d at 694. As 9,200 of the 350,000 compromised credit cards in *Remijas* were being used fraudulently, this court found that the monitoring services offer acknowledged future harm. *Id*. at 690. *Remijas* is distinguishable as no Datavault customer suffered an injury from the data incursion, and Midway is therefore not at risk of future harm. Datavault's offer of credit and identity-theft monitoring services is simply a pragmatic decision as "empirical evidence suggests that offering credit monitoring services to victims of data breach reduces by a factor of six the chances that firms that have suffered a[n] [incursion] will be sued." Lior Jacob Stahilevitz, *Data Security's Unjust Enrichment Theory*, 87 U. CHI. L. REV. 2477, 2488 (2020).

C. Midway Has No Concrete Claim to Emotional Distress.

While Midway alleges that the Datavault data incursion resulted in emotional distress and anxiety, Midway's claims are insufficient as he is unable to offer "more than conclusory statements" of his injury. *Persinger v. Sw. Credit Sys., L.P.*, 20 F.4th 1184, 1194 (7th Cir. 2021); R8. In *Wadsworth v. Kross, Liberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021), the plaintiff alleged that she suffered emotional harms such as "stress," "anxiety," and "uncertainty,"

following a Fair Debt Collection Practices Act violation. This Court found that without another concrete injury to the *Wadsworth* plaintiff, these emotional harms do not establish an injury-in-fact. *Id*. at 668–69 (finding that "these are quintessential abstract harms that are beyond our power to remedy"). The *Wadsworth* rule applies as Midway asserts that the possible disclosure of sensitive information resulted in anxiety and emotional distress. R9–10. Midway's claim is inadequate as Plaintiff fails to plead a concrete and non-emotional harm that is sufficient to constitute an injury-in-fact.

II. As No Alleged Injury Can Be Fairly Traced to Datavault's Conduct, This Court Cannot Provide Redress.

"Article III grants federal courts the power to redress harms that defendants cause plaintiffs," but without "an injury that the defendant caused and that the court can remedy, there is no case or controversy for the federal court to resolve." *Casillas v. Madison Ave. Assoc, Inc.*, 926 F.3d 329, 332–33 (7th Cir. 2019). Plaintiff fails to allege any concrete injury. Instead, Midway alleges general, future, and hypothetical injuries. Unlike in *Remijas*, the data allegedly stolen from Datavault does not create an impending risk of harm. *Remijas*, 794 F.3d at 693 (finding that "it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach"). Moreover, Midway is unable to allege actual harm comparable to a *Lewert* plaintiff establishing concrete and imminent future harm from a fraudulent credit card charge. *See Lewert*, 819 F.3d at 967. As Midway suffered no injury, there is no judicial remedy available. *See Sprint Communications Co., L.P. v. APCC Services, In.*, 554 U.S. 269, 273–74 (2008). For this reason, the district court was correct in finding the Midway has no Article III standing.

Applicant Details

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Applicant Education

BA/BS From	**University of Miami**
Date of BA/BS	**May 2012**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**December 15, 2022**
Class Rank	**25%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**The George Washington Law School Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 3, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Philadelphia, PA 19106

Dear Chief Judge Sanchez:

I am a January 2023 George Washington University Law School graduate, and I am writing to apply for the judicial clerkship vacancy with your chambers during the 2024-2025 term. Enclosed is a copy of my resume, transcript, references, and writing sample. Arriving separately are letters of recommendation from Professor Cheh, Professor Brown, Professor Kirkpatrick, and Dean Matthew. Thank you for your consideration.

Respectfully,

Michael Matthiesen

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EDUCATION

The George Washington University Law School — Washington, D.C.
Juris Doctorate, Health Law Concentration, GPA: 3.57, *with Honors* — Jan. 2023
Honors: *Top 5* of January 2023 graduating class, Dean's Certificate for *Most Pro Bono Hours* (424 Hours), Thurgood Marshall Scholar, HEERF Grant Recipient
Activities: Moot Court Board, 2021 Van Vleck Moot Court Competition (Top 3 Oral Advocates), Student Health Law Association, Health Rights Law Clinic, Faculty Appointments Committee

University College London — London, UK
Master of Arts, with Distinction, in Philosophy, Politics, and Economics of Health, GPA: 3.55 — Nov. 2015
Honors: Rotary International Global Grant Scholar, Goodenough College Member

University of Miami — Coral Gables, FL
Master of Science in Education, *with Graduate Honors in Community and Social Change,* GPA: 3.83 — Aug. 2014
Honors: 2014 Miami CCJ Silver Medallion, 2013 & 2014 Eli Segal Award, CNCS President's Call to Service Award

Bachelor of Arts in Political Science and International Studies, with Departmental Honors, GPA: 3.482 — May 2012
Honors: Bright Futures Scholar, Provost's Honor Roll, Dean's List, Pi Sigma Alpha Honor Society
Activities: Model United Nations, WVUM 90.5 FM Executive Board, Specialty Show Host, and Rotation DJ

EXPERIENCE

Baker McKenzie — Miami, FL
Associate Attorney, Litigation and Government Enforcement — Sept. 2023

U.S Securities and Exchange Commission — Washington, D.C.
Student Scholar, Division of Enforcement — Sept. 2022 – Nov. 2022
Research matters for the enforcement team on securities fraud and material omissions in cases involving crypto entities.

Baker McKenzie — Miami, FL
Summer Associate & Diversity Scholar — May 2022 – Jul. 2022
Researched matters for litigation team including FDA regulations, SEC compliance, and questions of state law.

The George Washington University Law School — Washington, D.C.
Research Assistant for Dean Dayna Matthew — Dec. 2020 – May 2022
Edited documents for publication and served as teaching assistant in the Race, Law, and Public Health course.

United States District Court for the District of Columbia — Washington, D.C.
Judicial Intern for The Honorable Royce Lamberth — Jan. 2022 – Apr. 2022
Researched and drafted orders on FOIA, January 6th proceedings, and the doctrine of consular non-reviewability.

Center for Disease Control & Prevention — Atlanta, GA
Public Health Law Intern — Sep. 2021 – Dec. 2021
Analyzed legal map of state public health laws to determine their impact on the spread of sexually transmitted diseases.

U.S Department of Health & Human Services, Office of Trade and Health — Washington, D.C.
Summer Law Clerk — Jun. 2021 – Jul. 2021
Researched the global approval of COVID-19 vaccines and how distribution interacts with U.S. laws.

Federal Public Defender's for the Southern District of Florida — Miami, FL
Legal Intern — Aug. 2020 – Nov. 2020
Conducted legal research, drafted compassionate release motions, and analyzed constitutional questions.

United States District Court for the Southern District of Florida — Miami, FL
Judicial Extern for The Honorable Cecilia M. Altonaga — Jun. 2020 – Jul. 2020
Conducted legal research and drafted orders on statutory interpleader, OFAC collections, and maritime law.

Miami Dade College — Miami, FL
Grant Coordinator, Advising & Operations — Sep. 2017 – Jun. 2020
Managed 25 employees, $500,000 budget, and related operations in compliance with U.S. Dept. of Education guidelines.

Adjunct Professor, Philosophy — Feb. 2016 – May 2020
Taught the "Introduction to Philosophy" and "Critical Thinking & Ethics" courses for 80+ students.

LANGUAGE SKILLS AND INTEREST: Conversational Portuguese; Beginner Spanish

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

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Page: 1

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Admit Term: Fall 2020

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Current Major(s): Law
Concentration(s): Health Law

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With Honors
Major: Law
Area of Concentration: Health Law

JD RANK: 5/18
MAY 2022 EQUIVALENT RANK 188/549

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
NON-GW HISTORY:			
2019-2020	Florida International Univ		
LAW 6202	Contracts	4.00	TR
LAW 6206	Torts	4.00	TR
LAW 6208	Property	4.00	TR
LAW 6212	Civil Procedure	4.00	TR
LAW 6216	Fundamentals Of Lawyering I	3.00	TR
LAW 6217	Fundamentals Of Lawyering II	2.00	TR
LAW 6218	Professional Responslbty/Ethic	3.00	TR
Transfer Hrs: 24.00			
Total Transfer Hrs: 24.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2020			
Law School			
Law			
LAW 6209	Legislation And Regulation Kovacs	3.00	A-
LAW 6214	Constitutional Law I Cheh	3.00	A-
LAW 6410	Health Care Law Rosenbaum	4.00	A
LAW 6644	Moot Court-Van Vleck Johnson	1.00	CR
Ehrs 11.00 GPA-Hrs 10.00 GPA 3.800			
CUM 11.00 GPA-Hrs 10.00 GPA 3.800			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2021			
Law School			
Law			
LAW 6210	Criminal Law Braman	3.00	B+
LAW 6400	Administrative Law Bignami	3.00	B+
LAW 6411	Health Care Law Seminar Lynch	2.00	A
LAW 6617	Law And Medicine Suter	3.00	B+
Ehrs 11.00 GPA-Hrs 11.00 GPA 3.455			
CUM 22.00 GPA-Hrs 21.00 GPA 3.619			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Summer 2021			
LAW 6230	Evidence Kirkpatrick	3.00	A
LAW 6668	Field Placement	3.00	CR
LAW 6672	The Art Of Lawyering Grillot	2.00	B+
Ehrs 8.00 GPA-Hrs 5.00 GPA 3.733			
CUM 30.00 GPA-Hrs 26.00 GPA 3.641			
Good Standing			
Fall 2021			
LAW 6232	Federal Courts Gavoor	3.00	A-
LAW 6250	Corporations Mitchell	4.00	A-
LAW 6360	Criminal Procedure Lerner	3.00	B-
LAW 6631	Health Rights Law Clinic Jackson	4.00	P
Ehrs 14.00 GPA-Hrs 10.00 GPA 3.367			
CUM 44.00 GPA-Hrs 36.00 GPA 3.565			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

SSN : ***-**-4367
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Date Issued: 03-MAR-2023

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Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2022			
Law School			
Law			
Health Law			
LAW 6300	Federal Income Tax	3.00	A-
	Brown		
LAW 6380	Constitutional Law II	4.00	B
	Colby		
LAW 6592	Jurisprudence Seminar	2.00	A
	Steinhardt		
Ehrs	9.00 GPA-Hrs 9.00 GPA	3.444	
CUM	53.00 GPA-Hrs 45.00 GPA	3.541	
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Fall 2022			
LAW 6234	Conflict Of Laws	3.00	B+
	Berman		
LAW 6402	Antitrust Law	3.00	A-
	Kovacic		
LAW 6656	Independent Legal Writing	2.00	A+
Ehrs	8.00 GPA-Hrs 8.00 GPA	3.708	
CUM	61.00 GPA-Hrs 53.00 GPA	3.566	
Good Standing			

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	61.00	53.00	189.00	3.566
TOTAL NON-GW HOURS	24.00	0.00	0.00	0.00
OVERALL	85.00	53.00	189.00	3.566

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

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Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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DESIGNATION OF CREDIT
All courses are taught in semester hours.

TRANSFER CREDIT
Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM
All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School
Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN
The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA
Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS
Undergraduate Grading System
A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System
(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System
A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System
H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

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The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in very enthusiastic support of Michael Matthiesen's application for a clerkship in your chambers. I have been fortunate to observe Michael as a student in one of my courses, as well as in his role as a leader in our academic community. His "A" work in my own class demonstrated that he has high intellectual capability, exceptional analytical skills, and an impressive ability to articulate his ideas both in writing and orally. These gifts make him perfectly suited for the work of your chambers.

Michael was a student in my spring 2022 Federal Income Taxation course. He approached me before classes started to indicate his complete lack of experience in the tax arena, but also to let me know of his deep interest in understanding legal systems and the ways in which tax law fit. Early on he expressed an intellectual curiosity that will serve him well in any area of law he chooses. Michael was able to not only parse through the minutiae of the Internal Revenue Code and to apply it to a given fact pattern to determine one or more possible outcomes, but he was also able to perceive the larger implications. For example, when we covered the disparate tax rate tables depending on marital status and the rules concerning transactions between married persons, he impressed our class with his perception that the tax rules were not neutral and could result in influencing the decision whether to marry in ways most likely not intended by Congress. I recall his similar contribution when we were discussing the constitutionality and feasibility of a wealth tax on the very wealthy. Michael's insight here was that the more fundamental fairness issues arose from the structure of a federal income tax system that delays the imposition of tax on certain property transactions and provides a preferential (reduced) rate when the income is ultimately subjected to tax. This observation reflected his very keen powers of analysis and his gift of looking at complicated structures in coherent way.

Michael was always enthusiastic and very-well prepared for class. He spoke regularly and effectively in class, often serving as a role model for the rest of the class. Michael has very strong personal skills and an easy ability to get along with students, faculty, and staff from all walks of life. He always exhibited respect and concern for other members of the community and worked hard to support those students in our class who found the challenge of the Federal Income Tax course to be daunting.

I have not been in a position to supervise lengthy writing projects for Michael, but I did take a look at his examination in my course in preparation for this letter. I found his essay answer to be very well-organized and written in a clear and persuasive manner. One of the examination questions required the students to address and resolve a novel question which was somewhat like issues covered in class, but also very different. His work product showed that he had engaged and grappled with the issues, examined appropriate routes of inquiry, and reached a confident conclusion that weighed the relative merits of possible approaches to a resolution, distinguishing pertinent authority from the rest. I believe this is the type of intellectual engagement and clear thinking that would make Michael a stellar clerk in your chambers.

I think very, very highly of Michael and his outstanding intellectual skills and abilities. He has my highest recommendation for a clerkship.

Thank you very much for considering my letter. Please feel free to contact me at karenbrown@law.gwu.edu or by phone at (202) 994-2538 (work) or (301) 537-3134 (cellphone) if you have any questions.

Sincerely,
Karen B. Brown
Theodore Rinehart Professor of Business Law

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Mr. Michael Matthiesen has asked me to write a letter in support of his application to serve as your judicial law clerk. I am pleased to do so and have seldom had the pleasure of writing more enthusiastically. As you may know, I have just become dean at the George Washington University Law School; Mr. Matthiesen is the first GW Law student I hired as a research assistant and teaching fellow. In the year we have worked together, I have learned that Michael Matthiesen embodies all that is quintessentially unique and excellent about GW Law students.

First, Mr. Matthiesen has extensive preparation in health law and policy that evince his thoughtful attention to building a deep fund of knowledge in several areas of the law while connecting the law to other fields of study. He has excelled at interdisciplinary study at multiple institutions of higher education in the United States and abroad. Beginning with his undergraduate preparation in Political Science and International Studies; continuing to his dual Masters degrees in Education and in Philosophy, Politics, and Economics of Health; and concluding most recently with his outstanding performance at GW Law, Mr. Matthiesen has consistently achieved the highest honors in all of his academic endeavors.

Second, in every setting, Mr. Matthiesen dedicates himself to applying the knowledge he has gained. He takes on formidable extracurricular activities that engage him in the lives of the institutions he attends as well as in the communities situated just outside the walls of the academy. GW Law students are characterized by their ability to integrate their studies with an understanding of the “real world” impact that law has on society. Mr. Matthiesen achieves this with a high level of intellectual sophistication and rigor that I have seldom seen in a law student.

I first met Mr. Matthiesen in October 2020 when he was a student host at a GW Law health law conference that introduced leading practitioners to students interested in the field. His well-rounded, intellectual curiosity caught my attention. While some other students’ inquiries focused on obtaining employment pointers, Mr. Matthiesen was one of the students who probed the nexus between theories and doctrines that inform the law, and the way that the practice of law incorporates those theories in order to improve society. For example, I was intrigued as I saw Mr. Matthiesen deftly and politely explore principles of social welfare theory concerning the social determinants of health with a speaker who had asserted her law firm’s transactional work reduced health inequality.

I was the beneficiary of Mr. Matthiesen’s superb research and analytical skills when, throughout the year, he provided extensive annotated outlines, briefs, and resources to help me craft the numerous, substantive speeches I gave about health law and policy. In the midst of a global pandemic that directly engaged my research interests, that was no mean feat. Mr. Matthiesen was able to keep up with preparing me to speak several times a month on topics that ranged from national vaccine policy, to the states’ regulations controlling public health emergencies, to recommendations for achieving the constitutional promise of equal protection for victims of the COVID-19 crisis. In addition, Mr. Matthiesen managed the formidable workload that came with being the course teaching fellow for a busy new law school dean. Here, Mr. Matthiesen’s prior experiences as an adjunct philosophy professor and senior academic and career advisor proved invaluable. He raised the quality of my course immeasurably not only because he is well-organized and possessed an extraordinary work ethic, but also because he is extremely well-read and generous toward his fellow students. I quickly learned that I was able to double the office hours available for my course simply because students were as happy to speak with Mr. Matthiesen as they were to speak with me!

I close with what may well be the most important observation I have made about Mr. Matthiesen this past year: he is an outstanding human being. I know this from his generosity with his time, which he manages well, his care and attention paid to the timely completion of every detail assigned to him, and also from the passion he displayed for disadvantaged groups whenever we spoke. But I also know this from the bits and pieces I learned about his family. I know few details about the burden Mr. Matthiesen carried caring for his mother, who is very ill, but what I learned proved just another of many examples that this young man is one of the most mature, accomplished, and capable law students that I have met in my 35 years in the legal academy. He will be an asset to your chambers. I highly recommend Michael Matthiesen to serve as your law clerk without any reservations or qualifications whatsoever

Sincerely yours,

Dayna Bowen Matthew
Dean and Harold H. Greene Professor of Law

Dayna Matthew - lawdeanmatthew@law.gwu.edu

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I understand that Michael Matthiesen, a third year student at the George Washington University Law School, is applying for a position with you. He has requested that I send a letter of reference on his behalf, and I am more than pleased to do so.

Mr. Matthiesen was a student in my Evidence class this past summer. He was the student who demonstrated the greatest understanding of the subject and contributed the most to our classroom discussions. It came as no surprise to me that he wrote the best final examination and received the highest grade in the class—an A.
He has demonstrated similar academic excellence in his other classes. He has a 3.64 GPA, which ranks him in the top 16-35% of his law school class and qualifies him for recognition as a Thurgood Marshall Scholar. He also compiled an outstanding academic record prior to coming to law school. He received a Master's degree from University College London in 2015, with distinction in Philosophy, Politics, and Economics of Health; a Master of Science degree with honors from the University of Miami in 2014; and his Bachelor of Arts degree from University of Miami in 2012, where he was on the Provost's Honor Roll and the Dean's List.

He has also excelled in extra-curricular activities while in law school. He was recognized as one of the top three oral advocates in the Van Vleck Moot Court Competition, the school's most prestigious and competitive moot court activity. He served on the Moot Court Board and was appointed a student member of the Faculty Appointments Committee. In recognition of his outstanding abilities, the law school Dean, Dayna Matthew, selected him to serve as her personal research assistant both last year and this year.

Mr. Matthiesen has also had valuable legal experience outside of law school. He served as a Judicial Extern for the Honorable Cecilia M. Altonaga of the United States District Court for the Southern District of Florida, as a Legal Intern for the Federal Public Defender's Office for Southern Florida, as a Summer Law Clerk for the U.S. Department of Health & Human Services, and as a Public Health Law Intern for the Center for Disease Control and Prevention.

In short, Mr. Matthiesen is one of our most outstanding law students. He is highly intelligent, articulate, personable, and responsible. He is dedicated to service in the public interest. In my opinion, he would be an extraordinary judicial clerk and any judge fortunate enough to hire him will be more than satisfied. I am pleased to be able to recommend him highly and without reservation. If you need more information about this outstanding candidate, please don't hesitate to contact me.

Sincerely,

Laird Kirkpatrick
Louis Harkey Mayo Research Professor of Law
The George Washington University Law School
lkirkpatrick@law.gwu.edu
(202) 994-2667

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Michael Matthiesen has applied to serve as your judicial clerk, and I enthusiastically recommend him to you. Michael was a student in my Fall 2020 Constitutional Law course and, more recently, authored an Independent Writing paper for me. We have also had numerous contacts and conversations outside of class. Michael earned one of the top grades in the Constitutional Law class. His exam was exceedingly well-written and sharply analytical, and his in-class performance was thoughtful and invariably moved our discussions to a higher level. Actually, he was a delight to have in class.

The Independent Writing paper was also stellar. He pursued a long-ago family member's prosecution and, reading through older documents and applying keen legal analysis, was able to show where the case went awry and how it arguably led to a miscarriage of justice.

Michael is very bright and very hard-working. Even before law school and certainly during law school, he has undertaken various positions that have honed his research and writing skills. Indeed, among his many positions, he even served as a judicial intern for one of our D.C. federal district court judges. His work experience included highly relevant research and writing tasks, across multiple subject areas.
My own work with Michael convinces me that he is someone that can be completely counted on to take on any assignment and deliver a high-quality effort every time. He is mature with a very pleasant personality. You would find him very easy to work with.

There's simply no downside here, and I highly recommend him to you. If you have any questions, please feel free to call me at 202-445-0215.

Yours Sincerely,

Mary M. Cheh
Eleyce Zenoff Research Professor of Law

Mary Cheh - mcheh@law.gwu.edu

MICHAEL MATTHIESEN
11451 S.W. 103rd Street, Miami, FL, 33176 • (305) 926-3664·• mmatthiesen@law.gwu.edu

WRITING SAMPLE

The attached writing sample is a judicial order I drafted while interning with Judge Royce Lamberth. This is the final version of the order which was edited by Judge Lamberth and his clerks.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK C. TROTTER,

Plaintiff,

v.

CENTER FOR MEDICARE AND MEDICAID SERVICES,

Defendant.

Case No. 1:19-cv-2008-RCL

MEMORANDUM OPINION

Plaintiff Frederick C. Trotter sued the Center for Medicare and Medicaid Services ("CMS") under the Freedom of Information Act ("FOIA") to compel disclosure of two types of information: first, the domain portions of email addresses associated with CMS-registered healthcare providers, and second, the providers' corresponding national provider identification numbers ("NPI numbers"). *See* Compl., ECF No. 1. On February 8, 2021, this Court rejected the bulk of Trotter's arguments and granted summary judgment in part to CMS. *See Trotter v. Ctr. For Medicare & Medicaid Servs.*, 517 F. Supp. 3d 1 (D.D.C. 2021). But the Court found that CMS could not withhold the domains of providers who participate in electronic health-information exchange because this information is already disclosed to the public. *Id.* at 9. Accordingly, the Court granted partial summary judgment to Trotter for this narrow subset of the requested information.

Now, Trotter moves for attorneys' fees and costs under 5 U.S.C. § 552(a)(E)(i) for the results of his FOIA litigation. *See* Pl.'s Mot. For Att'ys Fees ("Pl.'s Mot."), ECF No. 37; Pl.'s Mem. in Support ("Pl.'s Mem"), ECF No. 37-12. CMS opposes. Def.'s. Opp'n, ECF No. 40. Trotter filed a reply in support of his motion. Pl.'s Reply, ECF No. 41-16. Upon consideration of

the parties' filings, ECF Nos. 37, 37-12, 40, 41, 41-16, applicable law, and the entire record herein, the Court will **DENY** Trotter's motion for attorneys' fees and costs.

I. BACKGROUND

Federal regulations require virtually every healthcare provider to register with CMS and obtain a unique identification number (the NPI number). *See generally* 45 C.F.R. ch. 162. To obtain an NPI number, providers must register with a database and provide certain contact information—including an email address. *See Trotter*, 517 F. Supp. 3d at 1. Trotter is a "journalist, data journalist, and part-owner and founder" at CareSet Journal. Frederick Trotter Decl. ¶ 1, ECF No. 37-1. In January 2014, Trotter submitted a FOIA request to CMS for the email addresses associated with each NPI number. *See Trotter*, 517 F. Supp. 3d at 1. CMS identified 6,380,915 active providers. *Id.* at 4. But CMS informed Trotter that it would withhold the full email addresses to protect the healthcare providers' privacy. *Id.* Trotter subsequently amended his request to ask only for the domains associated with each provider.[1] *Id.* CMS—again—asserted the providers' privacy interests and refused to release the domains. *Id.* After exhausting his administrative remedies, Trotter filed this lawsuit to compel CMS's disclosure of (1) the domain portion of the email address associated with each healthcare provider registered with CMS and (2) the NPI numbers associated with these addresses. *See id.*

On February 8, 2021, this Court granted in part and denied in part the parties' cross-motions for summary judgment. *Id.* at 9. First, the Court rejected Trotter's arguments that CMS's search for records was inadequate. *Id.* at 6. Next, the Court concluded that CMS had properly invoked the FOIA's privacy exception for withholding the domains of providers who do not participate in

[1] "An email address consists of a local-part, the '@' symbol, and a domain. For example, in the email address bevo@utexas.edu, 'bevo' is the local-part and 'utexas.edu' is the domain." *Trotter*, 517 F. Supp. 3d at 1 n.1.

health-information exchange (a digital records sharing program with CMS). *Id.* at 8. However, the Court ordered CMS to disclose the email domains of providers who participate in the health-information exchange because CMS already publicly discloses their information and "[these providers] no longer have an interest in maintaining the privacy of their domains." *Id.* at 7. Rather than receiving information for the 6,380,915 active providers that CMS identified, Trotter received only 203,939 lines of provider information. *See Trotter*, 517 F. Supp. 3d at 1; Frederick Trotter Decl. ¶ 19.

Trotter now moves for $189,685.85 in attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E)(i). CMS concedes that Trotter is eligible for attorney's fees under the FOIA, but disputes whether Trotter is entitled to a fee award. Def.'s Opp'n 5. Trotter filed a reply in support of his motion. Pl.'s Reply.

Trotter's motion for attorneys' fees is ripe for review.

II. LEGAL STANDARDS

The FOIA permits attorney-fee awards "to encourage [FOIA] suits that benefit the public interest." *LaSalle Extension Univ. v. FTC*, 627 F.2d 481, 484 (D.C. Cir. 1980). Accordingly, courts may assess against the United States attorneys' fees and other litigation costs reasonably incurred in any case when the complainant has substantially prevailed. 5 U.S.C. § 552(a)(4)(E)(i); *see Morley v. CIA (Morley II)*, 894 F.3d 389, 391 (D.C. Cir. 2018). Courts considering whether to grant attorneys' fees consider two prongs—eligibility and entitlement. *See Church of Scientology of Cal. v. Harris*, 653 F.2d 584, 587 (D.C Cir. 1981).

First, a court must determine whether the plaintiff is eligible for fees. This prong is not at issue here. The parties agree that Trotter "substantially prevailed" and is eligible for fees. Pl.'s Mem. 4; Def.'s Opp'n 5; *see Grand Canyon Tr. v. Bernhardt*, 947 F.3d 94, 95 (D.C. Cir. 2020)

(explaining that plaintiffs who "obtained relief" through a "judicial order, or an enforceable written agreement or consent decree" have "substantially prevailed" and are eligible for fees).

But Trotter's eligibility is not the end of the matter. The Court must determine whether Trotter is entitled to fees. *See Jud. Watch Inc. v. Dep't of Commerce*, 470 F.3d 363, 369 (D.C. Cir. 2006) (explaining that eligibility does not determine entitlement under the FOIA). The touchstone of this inquiry is whether an attorneys' fee award is necessary to implement the FOIA. *See Davy v. CIA*, 550 F.3d 1155, 1158 (D.C. Cir. 2008) (citing *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977)). Four factors guide this inquiry: "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents." *Tax Analysts v. Dep't of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992); *see Morley v. CIA (Morley I)*, 810 F.3d 841, 842 (D.C. Cir. 2016). "[T]he first three factors assist a court in distinguishing between requesters who seek documents for public informational purposes and those who seek documents for private advantage." *Davy*, 550 F.3d at 1160. The first category of requesters need a fee incentive to litigate, the latter do not. *Id.* The Court has discretion to balance these factors and determine a fee award. *See id.* at 1158.

III. DISCUSSION

The parties agree that Trotter is eligible for an attorney-fee award because he achieved a favorable result from this Court. *See Trotter*, 517 F. Supp. 3d at 9; Pl.'s Mem. 4; Def.'s Opp'n 5. The Court agrees and need not engage in an eligibility analysis here.

But the Court, weighing the four factors identified by the D.C. Circuit, finds that Trotter is not entitled to attorneys' fees. Trotter fails to identify a public benefit derived from this case and CMS acted reasonably in withholding the requested information. So, while Trotter's role as a data

journalist weighs in his favor, the Court finds, on balance, that Trotter has failed to establish his entitlement to attorneys' fees.

A. Trotter Has Failed To Identify A Public Benefit Derived The Case

The first factor that the Court weighs is "the public benefit derived from the case." *Kwoka v. IRS*, 989 F.3d 1058, 1063 (D.C. Cir. 2021). There are two components to the public benefit inquiry. The first analyzes the "effect of the litigation." *Morley I*, 810 F.3d at 844 (quoting *Davy*, 550 F.3d at 1159). The second—and more important component—"requires an *ex ante* assessment of the potential public value of the information requested." *Id.*

As to the effect of the litigation, this component focuses only on whether the litigation caused an agency to release the requested documents. *Morley I*, 810 F.3d at 844 (citing *Davy*, 550 F.3d at 1159). This FOIA litigation caused the release of 203,939 lines of information. *See Trotter*, 517 F. Supp. 3d at 7; Pl.'s Mem. 7. But the mere release of information is not sufficient to swing the public-benefit factor in Trotter's favor. *See Cotton v. Heyman*, 63 F.3d 1115, 1120 (D.C. Cir. 1995) (explaining that the public-benefit prong turns on "evaluat[ing] the specific documents at issue in the case at hand"). Moreover, the public already had access to much of this information. Any effect of Trotter's lawsuit was minimal.[2]

The second (and more important) component of the public benefit inquiry requires the Court to make "an *ex ante* assessment of the potential value of the information requested, with little or no regard to whether the documents supplied prove to advance the public interest."

[2] Trotter tries to gain additional mileage from this component by arguing that this case "provided CMS as well as its participants with clear judicial guidance as to what records health providers can expect to remain private, and others that are clearly designed to be public." Pl.'s Mem. 8. The Court is not persuaded. Even if this Court were to consider this argument here, it is a longstanding, established principle that "if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes" and the information must be released. *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999). It is hardly the case that the Court's holding in this litigation provided citizens with new or "better tools with which to obtain government information." Pl.'s Reply 8.

Morley I, 810 F.3d at 844. While "the release of any government document benefits the public by increasing its knowledge of its government . . . Congress did not have this broadly defined benefit in mind" when authorizing attorneys' fees in FOIA cases. *Cotton*, 63 F.3d at 1120. Instead, Trotter must show "at least a modest probability of generating useful new information about a matter of public concern." *Id.* This includes the possibility that citizens may use the information to make "vital political choices." *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979).

This second component swings the public-interest factor in favor of CMS. Trotter's fee request relies on many of the same arguments and conclusory statements that the Court previously determined were inadequate. For example, Trotter rehashes his claim that the obtained data provide insights into how CMS performs its statutory and regulatory duties and whether CMS is reducing "waste, fraud, and abuse." *Compare* Pl.'s Mem. 8, *with Trotter*, 517 F. Supp. 3d at 8. But like before, Trotter fails to "show a nexus" between the email domains and "how CMS addresses waste, fraud, and abuse." *Trotter*, 517 F. Supp. 3d at 8. Trotter states that the released data "make[] it simpler to test which provider-to-hospital relationship should be regarded as primary,"—which means the organization is "willing to spend money to enable the provider to exchange healthcare data using CMS-approved digital protocols." Pl.'s Mem. 8. One year on, this assertion is "speculative because he provides no reason to believe that a provider's domain has any connection to his primary organization." *Trotter*, 517 F. Supp. 3d at 9. Nor does Trotter explain how a domain link between an individual provider and their associated organization illuminates whether the organization is "willing to spend money to enable the provider to exchange healthcare data using CMS-approved protocols." Pl.'s Mem. 8, *see Trotter*, 517 F. Supp. 3d at 9 ("Trotter[] . . . does not explain how knowledge about a provider's primary organization leads to information about clinical

approach."). Finally, Trotter again fails to explain how the data obtained is useful to detecting waste, fraud, and abuse. *See Trotter*, 517 F. Supp. 3d at 9.[3]

Trotter's belated attempts to plug the holes in his sinking arguments cannot succeed. In his reply, Trotter explains how the domains were used in his study and provides a copy of the study itself. *See, e.g.*, Pl.'s Reply 5–8; Alma Trotter Decl. ¶¶ 22–29, ECF No. 41-1. Because he raised these arguments for the first time in his reply filings, they are forfeited. *See MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010). The Court could not consider them anyway, for this factor requires an "*ex ante* assessment" of potential value. *Morley I*, 810 F.3d at 844.[4]

Finally, Trotter contends that he "has demonstrated his ability to disseminate the information obtained by this litigation to a high degree" through his website, newsletter, and data sharing processes. Pl.'s Mem. 7. This argument does not affect the Court's public-benefit analysis. Nearly half of the information that CMS released was already available to the public. *See* Alma

[3] Trotter repeats his claims that the data will facilitate epidemiological studies, but he again fails to explain how those studies shed light on CMS's functions as opposed to public health issues in general. *See Trotter*, 517 F. Supp. 3d at 8 n.4.

[4] Even if Trotter overcame these two hurdles, the Court remains skeptical that Trotter can show a nexus between the released domains and the public interests that he identifies. Given the forfeiture, the Court will provide only a brief preview of potential issues here. Trotter appears to have used the domains' corresponding websites to conclude that thousands of providers receiving incentive funding from CMS do not permit patients to receive their healthcare records electronically. *See* Alma Trotter Decl. ¶¶ 24–29. But Trotter provides no explanation of the regulatory framework governing payments under CMS's incentive program. If individual providers receiving incentive payments must certify that they are complying with the program, why should the inquiry as to whether they provide patients with electronic access to healthcare records end with their associated clinical organization's website? *See* Alma Trotter Decl. ¶ 53; ECF No. 41-10 at 5. *See generally* Center for Medicare & Medicaid Services, Public Use Files, https://tinyurl.com/2uxndhry; Center for Medicare & Medicaid Services, Registration & Attestation, https://tinyurl.com/2sn69s8t, ECF No. 41-10. Presumably, providers receiving incentive payments as individuals may have their own methods of providing electronic access to records that are not related to an associated clinical organization. *See Trotter*, 517 F. Supp. 3d at 9.

And beyond patients' electronic access to healthcare records—which is the focus of Trotter's study—CMS's incentive program has other objectives. *See, e.g.*, Center for Medicare & Medicaid Services, Medicare and Medicaid Promoting Interoperability Program Basics, https://tinyurl.com/mw4rd465 (identifying "Electronic Prescribing, Health Information Exchange, and Public Health and Clinical Data Exchange" as additional objectives). At this juncture, Trotter fails to show how the funds identified are the subject of waste, fraud, and abuse when they may well be furthering CMS's additional objectives.

Trotter Decl. ¶ 53. And there is "no public interest" in releasing documents already provided to the public. *Hooker v. U.S. Dep't of Health & Hum. Servs.*, No. 1:11-cv-1276 (ABJ), 2013 WL 12468053, at *4 (D.D.C. Oct. 11, 2013).

For these reasons, the Court finds that the first factor weighs heavily in favor of CMS.

B. The Commercial Benefit to Trotter and The Nature of Trotter's Interests In The Records Sought Lean In His Favor

The second and third entitlement factors lean in favor of Trotter. These factors address whether Trotter had a "sufficient private incentive" to pursue his FOIA request even without the prospect of obtaining attorneys' fees. *McKinley v. Fed. Hous. Fin. Agency*, 739 F. 3d 707, 712 (D.C. Cir. 2014) (citing *Davy*, 550 F.3d at 1160). These factors "'generally' should weigh in favor of scholars and journalists 'unless their interest was of a frivolous or purely commercial nature.'" *Kwoka*, 989 F.3d at 1064 (quoting *Davy*, 550 F.3d at 1160–61).

Trotter does not have a personal or commercial interest in this case. Rather, he has acted within the scope of his professional role as a "data journalist." Pl.'s Mem. 1; Def.'s Opp'n 17. CMS does not contend that Trotter's scholarly interests are frivolous or purely commercial. Instead, CMS focuses on the structure of Trotter's business, CareSet Journal. *Id.* CMS argues that that because CareSet Journal's commercial arm is "tight[ly] link[ed]" with its journalistic arm, Trotter has personal and commercial interests in the information that are "sufficient to ensure the vindication of the rights given in the FOIA." *Id.* (citing *Fenster v. Brown*, 617 F.2d 740 (D.C. Cir. 1979)). The Court is not persuaded.

These two factors should "generally aid scholars and journalists even if, in some cases, they do not weigh strongly in a plaintiff's favor and therefore ultimately 'do little to advance [their] position' when weighing all four factors." *Kwoka*, 989 F.3d at 1064–65 (quoting *McKinley*, 739 F.3d at 712). Trotter rightfully points out that even if CareSet Journal receives a pecuniary benefit

from NPI numbers and domain names, journalistic efforts are special. *Kwoka*, 989 F.3d at 1064. Other news organizations might have "tight linkage" between their commercial and journalistic arms—but the D.C. Circuit and courts in this district have time and again recognized that these entities are "among those whom Congress intended to be favorably treated under FOIA's fee provision." *Davy*, 550 F.3d at 1162; *see WP Co. LLC v. U.S. Small Bus. Admin.*, 514 F. Supp. 3d 267 (D.D.C. 2021); *Washington Post v. U.S. Department of Defense*, 789 F. Supp. 423 (D.D.C. 1992). So too here. "[S]cholarly interest, regardless of private incentive, generally should not be considered commercial." *Kwoka*, 989 F.3d at 1065. Since CMS does not refute Trotter's role as a journalist (data journalist or otherwise), the Court will not treat his interest as commercial.

Accordingly, the Court finds that the second and third factors weigh in favor of Trotter. But while these factors weigh in favor of Trotter because of his uncontested status as a "data journalist," they do "little to advance [his] position when weighing all four factors." *McKinley*, 739 F.3d at 712.

C. CMS Acted Reasonably

The final factor cuts decisively in favor of CMS. This factor requires the Court to evaluate whether CMS "had a reasonable basis in law" for opposing disclosure and whether CMS was "recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *McKinley*, 739 F.3d at 712 (internal citations omitted). It is the agency's burden to show that it had a colorable or reasonable basis for not disclosing the material. *Edelman v. Sec. & Exch. Comm'n*, 356 F. Supp. 3d 97, 108 (D.D.C. 2019) (quoting *Davy*, 550 F.3d at 1163). "If the Government's position is correct as a matter of law, that will be dispositive. If the Government's position is founded on a colorable legal basis in law that will be weighed along with other relevant considerations in the entitlement calculus." *Davy*, 550 F.3d at 1162 (citations omitted); *see Kwoka*,

989 F.3d at 1159 (explaining that while "no one factor is dispositive . . . the court will not assess fees when the agency has demonstrated that it had a lawful right to withhold disclosure"). This inquiry focuses on the reasonableness of the agency's position throughout the litigation, even if the Court ultimately ordered disclosure. *See Edelman*, 356 F. Supp. 3d at 108.

CMS contends that, in response to Trotter's first request, it reasonably withheld the full email addresses of providers to protect their personal privacy. Def.'s Opp'n 12. Even Trotter seems to agree that CMS's initial assertion of the FOIA's personal-privacy exemption (Exemption 6) was reasonable because he amended his request from "the email addresses of the healthcare providers" to just "the domain names of all healthcare providers' email addresses." *Id.* at 8.

After considering Trotter's amended request, CMS again invoked FOIA Exemption 6. This Court agreed that CMS "demonstrated privacy interests in shielding the domains of providers who do not participate in heath-information exchange . . . [and Trotter] identified no public interest in disclosing them." *See Trotter*, 517 F. Supp. 3d at 9. CMS's decision to withhold most of the requested domains was not only reasonable, it was also correct. And Trotter is not entitled to fees where the government's actions were legally justified. *See Davy*, 550 F.3d at 1162.

The remaining issue is whether the other, wrongfully withheld domains affect how the Court balances this factor. They do not. Trotter's success in this litigation stems only from CMS's failure to segregate the 3.2% of domains for providers that participate in a health-information exchange. But Trotter does not appear to have argued—until this litigation—that CMS needed to segregate domains of providers that participate in health-information exchange from the other domains. Trotter's FOIA request did not distinguish between these two categories of domains. *See* ECF No. 23-6. Instead, Trotter focused his segregation arguments on whether CMS could segregate solo practitioners from all other healthcare providers. *See* ECF No. 25-1 at 9.

In light of these broad requests, the Court concludes that CMS's withholdings were reasonable. CMS implemented a global response rooted in sound FOIA principles, its policy notice in the Federal Register, and good faith. None of CMS's summary-judgment filings disputed the release of these specific domains or this particular issue. *Cf. Kwoka*, 989 F.3d at 1066. For the small subset of domains that were ultimately released, the Court agreed with CMS that there is *no* public interest in their disclosure. *See Trotter*, 517 F. Supp. 3d at 9. And in regard to the privacy interests at stake, the released data indicate that not all the domains of providers participating in information exchange were even previously available to the public. *See, e.g.*, Alma Trotter ¶ 51.

At bottom, the Court cannot say that CMS's position was unreasonable or that CMS's behavior was "recalcitrant" or "obdurate" when it was correct on the vast majority of its claims and the legal framework that was the focus of this litigation. *See People for the Ethical Treatment of Animals v. USDA*, No. 1:03-cv-195, 2006 WL 508332, at *5 (D.D.C. Mar. 3, 2006) (concluding that, if an agency prevails "on the majority of its [FOIA exemption] claims, its overall position was reasonable"). Based on its legal position, the Court concludes that CMS acted reasonably in its withholding. This factor weighs heavily in favor of CMS.

Upon consideration of the four factors, the Court finds that the balancing test weighs in favor of CMS and that Trotter is not entitled to attorneys' fees.

IV. CONCLUSION

Based on the foregoing, the Court will deny Trotter's motion for attorneys' fees by separate order.

Date: 3/24/22

Royce C. Lamberth
United States District Judge

Applicant Details

First Name	**William**
Last Name	**McCabe**
Citizenship Status	**U. S. Citizen**
Email Address	**will.j.mccabe@gmail.com**
Address	**Address** Street **713 South Henry Street** City **Williamsburg** State/Territory **Virginia** Zip **23185** Country **United States**
Contact Phone Number	**8576362950**

Applicant Education

BA/BS From	**University of South Carolina-Columbia**
Date of BA/BS	**May 2021**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 18, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**William & Mary Bill of Rights Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Combs, Nancy
ncombs@wm.edu
757-221-3830
Warren, Christie S.
cswarr@wm.edu
(757) 221-7852
Bisarya, Sumit
s.bisarya@idea.int

This applicant has certified that all data entered in this profile and any application documents are true and correct.

William McCabe
713 South Henry Street
Williamsburg, Virginia 23185
(857) 636-2950
wjmccabe@wm.edu

June 11, 2023

The Honorable Juan R. Sánchez
U.S. District Court, E.D. Pa.
14613 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Chief Judge Sánchez:

I am a rising third-year law student at William & Mary Law School, where I am ranked in the top 12% of my class, serve as a member of the *William & Mary Bill of Rights Journal*, and serve as the President of the International Law Society. I am writing to apply for a judicial clerkship in your chambers for the term. I am motivated to serve as a clerk because I intend to go into a public service legal career, and through the experience of working as a judicial clerk I would be able to contribute to the administration of justice in a highly impactful way. Furthermore, I plan to go into litigation, and working as a judicial clerk would help me to become a more skillful advocate by providing the invaluable experience of evaluating lawyers' arguments before a court on a broad array of subjects and learning firsthand how a court functions.

My experiences during law school have helped prepare me to serve as a judicial clerk, and I have pursued several opportunities to acquire practical legal skills outside of a classroom setting. Through my externship experience at Gordon & Rees, for example, I have strengthened my legal research and writing skills in a real-world setting by researching topics covering various legal practice areas and preparing memos on diverse issues. I will expand on that experience through my work this summer for the Massachusetts Commission Against Discrimination and in my work for the Law School's Immigration Clinic next fall, both of which will involve direct interaction with clients and firsthand experience with litigation.

My academic activities have also helped me to build the skills necessary to be an effective clerk. As a staff member on the *William & Mary Bill of Rights Journal*, I have gained a deeper understanding of legal reasoning and become a more attentive reader through cite-checking, and I have sharpened my research skills through the Note-writing process. In my coursework, I have also improved my research and writing skills, particularly in the courses I took in Post-Conflict Justice and Islamic Law, each of which required me to write a 30-page final research paper, for which I earned high grades. These classes and others also required me to create and deliver presentations on various legal topics in collaboration with other students. This work enhanced my project management, interpersonal communication, and teamwork abilities, which I will bring to your chambers to work effectively with staff attorneys, clerks, and others as a strong team member.

Enclosed for your consideration are my resume, transcript, and writing sample, as well as letters of recommendation from Professor Nancy Combs, Professor Christie Warren, and Mr. Sumit Bisarya, the Head of Constitution-Building Processes for the International Institute for Democracy and Electoral Assistance. Thank you for considering my application, and I would be grateful for the opportunity to discuss my qualifications further in an interview.

Respectfully,

William McCabe

William McCabe

#907-B, 713 South Henry Street, Williamsburg, Virginia 23185 | (857) 636 - 2950 | wjmccabe@wm.edu

EDUCATION

William & Mary Law School, Williamsburg, Virginia
J.D. expected, May 2024
G.P.A.: 3.6, Class Rank: 21/175 (tied)

Honors: ***William & Mary Bill of Rights Journal***
Phi Delta Phi International Legal Honor Society, Member
Publications: *Convening for (Climate) Change: The Constitutional Case for a U.S. Climate Assembly*, 32 WM. & MARY BILL RTS. J. (forthcoming 2024)
Activities: International Law Society, President
Public Service Fund, General Board Member
Labor and Employment Law Society
Research Assistant for Profs. Evan Criddle and Christie Warren, Summer 2023

University of South Carolina, Columbia, South Carolina
B.S., *magna cum laude*, International Business and Finance, French and European Studies minors, May 2021
G.P.A.: 3.949

Honors: Graduation with Leadership Distinction in Global Learning
Activities: French Club (2019-2021), Vice President (Fall Semester 2019)
Fencing Club (2017-2019)
Study Abroad: ICHEC Brussels Management School, Brussels, Belgium, February – June 2020

EXPERIENCE

Massachusetts Commission Against Discrimination, Boston, Massachusetts
General Counsel Intern — June to August 2023
Will research employment discrimination issues and assist in preparing for public hearings and court proceedings.

Gordon Rees Scully Mansukhani, LLP, Williamsburg, Virginia
Legal Extern — January to April 2023
Conducted legal research on legal issues involving FLSA employee classification, contract enforceability, wrongful termination, and other topics in employment law practice.

International Institute for Democracy and Electoral Assistance, The Hague, Netherlands
Constitution-Building Program Intern — May to August 2022 & Fall 2022
Researched contemporary constitutional issues such as citizens' assemblies, diaspora democratic participation and representation, and constitutional structures of countries across diverse regions. Prepared reports comparing countries' constitutional history and structures and responses to constitutional challenges.

McAfee, Brussels, Belgium
Policy Intern (Europe, Middle East, Africa) — February to March 2020
Attended client meetings and EU cybersecurity conferences to monitor client relationships and public policy priorities. Analyzed cybersecurity topics to identify opportunities and developments.

Massachusetts Environmental Police – Fiscal Unit, Boston, Massachusetts
Fiscal Intern — May to June 2019 & January 2020
Compiled and analyzed departmental expenses to identify variation between actual expenditures and projections. Performed detailed quality assurance review of boat registration and title documents.

Nobles Day Camp, Dedham, Massachusetts
Group/Swing Counselor and Bus Monitor — Summers 2015 to 2021
Organized indoor and outdoor activities for about 30 campers ranging from 5 to 14 years old.

WILLIAM & MARY LAW SCHOOL
OFFICE OF CAREER SERVICES

Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.
- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

Transcript Data

STUDENT INFORMATION

Name : William J. McCabe

Curriculum Information

Current Program
Juris Doctor

College: School of Law

Major and Department: Law, Law

***Transcript type:WEB is NOT Official ***

DEGREES AWARDED

Sought: Juris Doctor **Degree Date:**

Curriculum Information

Primary Degree

College: School of Law

Major: Law

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	16.000	16.000	16.000	12.000	42.00	3.50

INSTITUTION CREDIT -Top-

Term: Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	101	LW	Criminal Law	B+	4.000	13.20	
LAW	102	LW	Civil Procedure	B+	4.000	13.20	
LAW	107	LW	Torts	B+	4.000	13.20	
LAW	130	LW	Legal Research & Writing I	A-	2.000	7.40	
LAW	131	LW	Lawyering Skills I	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	47.00	3.35
Cumulative:	15.000	15.000	15.000	14.000	47.00	3.35

Unofficial Transcript

Term: Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	108	LW	Property	B	4.000	12.00	
LAW	109	LW	Constitutional Law	A	4.000	16.00	
LAW	110	LW	Contracts	B+	4.000	13.20	
LAW	132	LW	Legal Research & Writing II	A-	2.000	7.40	
LAW	133	LW	Lawyering Skills II	P	2.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	14.000	48.60	3.47
Cumulative:	31.000	31.000	31.000	28.000	95.60	3.41

Unofficial Transcript

Term: Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	115	LW	Professional Responsibility	A	2.000	8.00	
LAW	309	LW	Evidence	A-	3.000	11.10	
LAW	382	LW	Human Rights Law	A	3.000	12.00	
LAW	394	LW	Post-Conflict Justice & Law	A-	3.000	11.10	
LAW	407	LW	Labor Law	A	3.000	12.00	
LAW	761	LW	W&M Bill of Rights Journal	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	54.20	3.87
Cumulative:	46.000	46.000	46.000	42.000	149.80	3.56

Unofficial Transcript

Term: Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	385	LW	International Criminal Law	B+	3.000	9.90	
LAW	453	LW	Administrative Law	B+	3.000	9.90	
LAW	456	LW	Employment Law	A-	3.000	11.10	
LAW	604	LW	Islamic Law Seminar	A-	3.000	11.10	

LAW	703	LW	Directed Reading	P	1.000	0.00
LAW	759	LW	Priv/In Hse Counsel Extern	P	2.000	0.00
LAW	761	LW	W&M Bill of Rights Journal	P	1.000	0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	12.000	42.00	3.50
Cumulative:	62.000	62.000	62.000	54.000	191.80	3.55

Unofficial Transcript

TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	62.000	62.000	62.000	54.000	191.80	3.55
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	62.000	62.000	62.000	54.000	191.80	3.55

Unofficial Transcript

COURSES IN PROGRESS **-Top-**

Term: Fall 2023

Subject	Course	Level	Title	Credit Hours
LAW	305	LW	Trust and Estates	3.000
LAW	452	LW	Employment Discrimination	3.000
LAW	485	LW	Immigration Law	3.000
LAW	496	LW	Intl Business Transactions	3.000
LAW	619	LW	Supreme Court Seminar	1.000
LAW	786	LW	Immigration Clinic I	3.000

Unofficial Transcript

[Overall Financial Aid Status | Financial Aid Eligibility Menu]

RELEASE: 8.7.1

Nancy Combs
Robert E. & Elizabeth S. Scott Research Professor,
Ernest W. Goodrich Professor of Law and
Director, Human Security Law Center

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-3830
Email: ncombs@wm.edu

June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Recommendation for Will McCabe

Dear Judge Sanchez:

I am writing to recommend Will McCabe, who has applied for a clerkship in your Chambers. Will has taken three classes with me, and I've had countless conversations with him, so I can attest with confidence that Will is a very smart and engaged student who will surely make an excellent law clerk.

I first met Will when he was a 1L in my Criminal Law class. I taught two sections of Criminal Law that year, but despite having 120 first-year students, I got to know Will quite well due to his interest in international law and policy. He also spent his 1L summer in The Hague where I lived for a decade, so we conversed frequently both about legal topics as well as apartments, commuting and other logistics.

In one sense, Will is a typical clerkship applicant. He has very good grades, which reflect mastery of the material, strong legal analytical skills and hard work. In the three classes Will has taken with me, I've seen ample evidence of all of these qualities. Will's class participation shows keen engagement with the material. He does the reading; he understands the doctrine (typically at a very high level), and he enjoys thinking about more complex applications and more intricate policy challenges. Will also is a genuinely nice person. As mentioned, I've had many highly enjoyable conversations with him, and I've seen him interact with his peers. He has great social skills and would be an unquestionable asset to the collegiality of your chambers.

If this was all there was to say about Will, I would certainly urge you to consider his application favorably. He is obviously very smart, and he has the skills and temperament to be an excellent law clerk. But I recognize that many of your other applicants present similar qualities. Will, however, is unique in two interrelated ways that likely are highly relevant to your selection decision.

First, Will is one of the most intellectually curious students that I've ever had the pleasure to know. Most students come to office hours to rehash some knotty question of doctrine that they failed to understand or to seek advice on career plans or even exam prep. My conversations with Will, by contrast—whether in office hours or just in the hall between classes—are far more eclectic, and they commonly focus on some esoteric book he is reading (unrelated to class) or a paper he is writing. Will is a true intellectual. He is interested in a host of topics (history, philosophy, and every aspect of law) and he is able to discuss these subjects with depth and sophistication. For this reason alone, you will be happy to have him in chambers. A young person who continues to be eager to learn about a wide range of topics—even in law school—is both a rare breed and a pleasure to have around.

Second, Will is an excellent writer. Will's impressive transcript reflects his overall mastery of doctrine and facility with legal reasoning. But a more careful look at his transcript reveals his impressive writing. Will's class rank shows him to be one of our best and brightest in general, but his grades in his legal writing classes and in paper seminars are especially strong. This should come as no surprise. A student who is as well-read and engaged with ideas as Will is bound to value and develop exemplary writing skills.

As you can tell, I consider Will to be an extremely strong applicant for a clerkship position, and I hope you'll reach out to allow me to answer any questions you might have.

Sincerely,

/s/

Nancy Combs
Ernest W. Goodrich Professor of Law

and Director, Human Security Law Center

Christie S. Warren
Professor of the Practice of International and Comparative Law and Director, Center for Comparative Legal Studies and Post-Conflict Peacebuilding

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-7852
Fax: 757-221-3261
Email: cswarr@wm.edu

June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is a pleasure for me to write this recommendation for Will McCabe, who is applying for a clerkship in your chambers. Will has been my student for the past year, and I am very familiar with his skills and abilities.

Will's resume speaks for itself and demonstrates his commitment to hard work and excellence. By the time he began law school at William & Mary, he had already earned a number of awards and accolades, including graduating magna cum laude from the University of South Carolina, where he was active in several extracurricular clubs and sports and received leadership distinction in global learning. His trajectory of excellence has continued without pause during his first two years of law school; in addition to maintaining a high-grade point average, he is active in a number of our student organizations and serves as President of our International Law Society.

As of the end of his second year of law school, Will is in the top tier of his class. In addition to his courses, he is a member of our Bill of Rights Journal and has authored an article on constitutional issues and climate change that will be published next year. His research and writing skills are excellent. I have had him in two of my courses during this past academic year; each course required that he write a major research paper, and he earned top grades in both classes. His work was so strong that I have hired him as my Faculty Research Assistant for this summer.

One of my responsibilities as Director of the Center for Comparative Legal Studies is hiring a small group of exceptionally talented students to serve as international interns each summer. Last year I hired Will to intern at one of our most competitive and prestigious placements, the International Institute for Democracy and Electoral Assistance at the Hague. Throughout the summer, I monitored the work he was doing, and at the conclusion of the internship I debriefed his supervisor. Will received outstanding reviews from the director of the Constitution-Building Processes Programme, where he had carried out comparative constitutional research across a variety of legal systems. The director remarked to me that he had rarely known a law student as adept at quickly grasping the nuances of the type of comparative research Will had done and producing high quality reports without assistance.

Importantly, Will is a pleasure to work with. He does not have the type of ego one might expect in someone with his abilities; he is popular among his classmates and has a lovely personality. I can't think of a better person to work with in challenging circumstances when perfect work products are consistently required. If I were a judge, he is exactly who I would want to hire.

I recommend Will completely and without reservation. If you give him the opportunity to work with you, I promise you will not be disappointed. If you have any follow-up questions, or if I can provide you with any additional information, please do not hesitate to let me know.

Sincerely,

/s/

Christie S. Warren
Professor of the Practice of International and Comparative Law Director, Center for Comparative Legal Studies and Post-Conflict Peacebuilding